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The Environment

The Rights of Nature and the Death of God
Joel Schwartz

Bounty Hunting and Environmentalism
Michael S. Greve

The Free Market and the Environment
Richard L. Stroup & Jane S. Shaw

Problems and Non-Problems in the American Economy — *Herbert Stein*

The Downtown Job Puzzle — *Bernard J. Frieden*

The Costs of Free Information — *Richard A. Guida*

In Praise of Punishment

Stanley C. Brubaker

FALL BOOKS SUPPLEMENT

Reviews by *Lino A. Graglia, Lawrence M. Mead, Roger Starr, Leslie Lenkowsky, David Blankenhorn, Brian Mannix, R. Shep Melnick, Caleb Nelson, Philip J. Costopoulos,* and *Jeremy Fand*

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The rights of nature and the death of God

JOEL SCHWARTZ

AT LEAST SINCE Aristotle, justice has been understood to require that equals be treated equally, and therefore to apply to those who were equal or at least could plausibly claim some measure of equality. The historical progress of liberalism can be measured by the increasing success of different kinds of people in making this claim; slaves have demanded equality with masters, commoners with aristocrats, Jews with Christians, blacks with whites, and women with men.

Common to all of these claimants, of course, has been humanity, and the capacity for self-assertive speech—unique to human beings—that Aristotle also thought relevant to the understanding of justice. Contemporary environmental ethics, however, often goes far beyond the liberal tradition—not to speak of Aristotle—in its radicalized egalitarianism. As Roderick Frazier Nash suggests in *The Rights of Nature*, an informative new history of environmental ethics, contemporary environmentalist doctrine often rejects the belief "that it is right to protect and wrong to abuse nature ... from the standpoint of human interest." "'Ecological egalitarianism,'" as Nash calls it, instead "accords nature ethical status at least equal to that of humans. The antipode is 'anthropocentrism,' according to

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which humans are the measure of all nature." Nash presents the history of environmental ethics in terms of the evolution of liberalism, in which "natural rights" (the rights that human beings once claimed to have by nature) have developed into "the rights of nature" (the rights that nature has against human beings).

Some ecological egalitarians have made the strange-sounding assertion that natural objects (mountains and rivers as well as animals and plants) should be given legal rights and should have independent standing in the American judicial system. This claim was first made by Christopher D. Stone in his 1972 *Southern California Law Review* article "Should Trees Have Standing?—Toward Legal Rights for Natural Objects" (whose argument was accepted and cited that same year by Justice Douglas in his dissent in *Sierra Club* v. *Morton*). The contention was then developed in a 1974 *Yale Law Journal* article by the well-known constitutional theorist Laurence H. Tribe, entitled "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law."[1] Together the essays raise interesting questions about the practice (Stone) and the theory (Tribe) of ecological egalitarianism.

Ethical and self-interested environmentalism

Environmentalists often presuppose an egalitarian relationship between humanity and nature, but not necessarily on ethical grounds. An environmentalism that can fairly be called Hobbesian demands no ethical sacrifice from us, instead appealing to human self-interest in the most direct way. Hobbesian environmentalism, like Hobbesian political philosophy, takes its bearing from the fear of death, viewing death as the greatest evil. Its adherents claim that unless humans treat the environment more cautiously and less violently, the environment will (so to speak) take revenge on us, and bring about the unpleasantly premature death of the human species. Our demise may stem from the exhaustion of irreplaceable natural resources, or from the creation of a climate that cannot support human life—but in any case, the argument goes, unless we are more ecologically responsible and less short-sighted, our lives will be solitary, poor, nasty, brutish, and short. Human self-interest requires that we cease to exploit nature so systematically.

[1]Tribe published a revised and expanded version of his article in 1976, in a volume entitled *When Values Conflict: Essays on Environmental Analysis, Discourse and Decisions*. All quotations are taken from this revised version.

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This argument is persuasive, of course, only if its factual premises are correct. When environmentalist Chicken Littles tell us that the sky is falling—as Paul Ehrlich came close to doing in 1969, predicting that "the end of the oceans [would subsequently be said to have come] late in the summer of 1979"—they deservedly lose credibility. Advocates of Hobbesian politics can with some plausibility point to Beirut; advocates of Hobbesian environmentalism must instead explain away the continued existence of the oceans.

In some respects it is hard to make an altogether self-interested defense of environmentalism, if only because environmentalists so often proclaim the need to make economic sacrifices that self-interested (if perhaps short-sighted) people tend to reject. For this reason the ethical environmentalism of Stone and Tribe—which openly admits its conflict with human self-interest, finding therein its nobility—can seem to be the more powerful doctrine.

Ethical environmentalism derives from Kantian morality. This is true even though Kant radically differentiates morality from nature; for him, only humans can be moral because only they can act freely, can transcend natural necessity, by voluntarily imposing upon themselves a law that restricts self-interest (in that it enjoins them to treat themselves no better and no differently than they treat others). The basis of this moral law is the recognition of the fundamental equality of all human beings, which is found in their putatively equal capacity to act as moral agents.

Ethical environmentalism goes beyond Kantian morality by extending the applicability of the moral law, which no longer applies simply to relations among people, but also to relations between people and all natural objects. This expanded moral law asks people to regard as immoral the preference for human interests over those of animals, vegetables, and minerals. Anthropocentrism—the preference for our species over others—is held to be no less immoral than the selfish and unfair preference for oneself over other people.

Representing nature

Advocates of granting legal rights to nature argue that their position is a logical development of the liberal extension of rights to blacks and women. (How much comfort blacks and women take from the implication that they fall part of the way on a continuum from white males, through dogs and horses, to trees and moun-

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tains, is another question.) The advocates, of course, are aware of the obvious difference: humans who happen to be black or female can speak up to demand their rights, while natural objects cannot. Stone responds to this objection:

> It is no answer that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them.... One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents—human beings who have become vegetable. If a human being shows signs of becoming senile and has affairs that he is de jure incompetent to manage, those concerned with his well being make such a showing to the court, and someone is designated by the court with the authority to manage the incompetent's affairs.

But Stone's rejoinder does not speak to the fundamental difficulties. Stone simply assumes that nature, like the other entities that he mentions, can be represented; and even if it can be, he wrongly ignores the question of what entitles anyone to act as nature's representative. Nature cannot consent to being represented; it gives us no sense of how its "rights" are to be secured or who (since it cannot be what) is to secure them. In the other examples given by Stone, the legally incompetent are represented by someone who can plausibly claim to act on their behalf: a relative, a property owner, a trustee, or an elected official. In the case of the environment this is not so; it is unclear that anyone—apart from the government that administers wilderness or recreation areas (in the people's name, not in nature's)—can reasonably claim to speak as nature's representative.

Stone, however, rejects the government's claim; as he states himself, recognizing it would simply endorse the status quo: "[T]he Department of Interior [sic] was conceived as a sort of guardian of the public lands.... [But] the Department is itself one of the bogeys of the environmental movement." Thus Stone emphatically does not consider the Department of the Interior a suitable representative for nature, opting instead for a court-appointed "guardian," such as "[t]he Sierra Club, Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Counsel [sic], and the Izaak Walton League." Properly understood, then, giving rights to nature means giving privileges to private environmental organizations.

To defend his claim that environmentalists should represent nature, Stone asserts that "natural objects *can* communicate their

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wants (needs) to us, and in ways that are not terribly ambiguous." After all, he "can judge ... whether and when [his] lawn wants (needs) water." But this analogy is problematic in a number of different ways. First, lawns themselves are not natural; instead they are artifacts that humans develop out of natural materials, by transforming them for their own pleasure. As such, they are products of that same anthropocentric quest to alter nature that Stone is writing to reject. Second, and more to the point, Stone presumably owns his lawn, which entitles him to decide how to make use of it; the title that environmental organizations (as opposed to the government) have to decide whether to develop or to preserve the wilderness areas that are his concern is less clear by far. Nature has designated neither the government nor the environmentalists to speak for it; but the people at least have designated the government and not private groups of environmentalists to speak for them. On what grounds, then, should courts decide that the environmentalists are the true guardians or representatives of nature?

This last question becomes still harder to answer when one realizes that the very notion of the wants and needs of nature is metaphysically bizarre. As Mark Sagoff, an earlier critic of Stone, has written, "Environmentalists always assume that the interests of [natural] objects are *opposed* to development. How do they know this? Why wouldn't Mineral King [a mountain whose development the Sierra Club filed suit to forestall] want to host a ski resort, after doing nothing for a billion years?"

It would be more reasonable and more accurate to say that nature does not have wants; instead, people have different and incompatible wants with respect to nature, sometimes favoring development and sometimes preservation. It is the task of representative government—not of unelected judges, unelected environmentalists, or unelected developers—to mediate among these conflicting wants with respect to our public lands, thereby translating these wants into public policy.

And representative government can represent only humans, since only they can make their wishes known. The difficulty that this fact poses for Stone's argument emerges from the following passage:

> It would seem ... that Chief Justice Warren was only stating the obvious when he observed in *Reynolds v. Sims* that "legislators represent people, not trees or acres." Yet could not a case be made for a system of apportionment which did take into account the wildlife of an area? It strikes

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> me as a poor idea that Alaska should have no more congressmen than Rhode Island[,] primarily *because there are in Alaska all those trees and acres, those waterfalls and forests.*

Unfortunately for Stone, trees, acres, waterfalls, and forests cannot vote; only people can. To accord more representation to Alaska than to Rhode Island would be to weight Alaskans' votes more heavily than Rhode Islanders'. Not only would this be unjust; of more immediate relevance for Stone's purposes, it might not even safeguard the environment. Voters who live near natural resources are often more eager to develop them than to preserve them. As Stone himself concedes: "The reality of the [Alaskan] political situation might just as likely result in the election of additional Congressmen with closer ties to oil companies and developers." The logical solution for this quandary would be somehow to ensure that only the ballots of Alaskan voters with ecologically "correct" attitudes were weighted more heavily.

Indeed, Stone would like the judiciary to implement just such a solution. In effect he hopes to avoid the possibly unwelcome outcomes that representative government might produce by having an aristocracy of judges designate environmental organizations as the guardians of wilderness areas. He favors the strategy, so popular in so many law schools, of imposing a judicial solution upon what is essentially a political controversy; he wants the environmentalist movement to be given a privileged position as the supposed representative of nature.

Rather than relying in this way on judicial fiat, it might occur to environmentalists that they would do better to work through the institutions of representative government. Environmentalists should be less concerned to persuade judges that only environmentalists can represent trees, and more concerned to persuade ordinary people that environmentalists can worthily represent them, that it is often in ordinary people's interests to preserve wilderness areas.

This task is not so hopeless as environmentalists often suggest. The governing metaphor of Tribe's essay—which points as evidence of the popular dismissiveness of nature to people's increasing preference for plastic trees over genuine ones—is rather ludicrous; it is no accident that "plastic" is a pejorative (remember *The Graduate*?), and "natural" a term of praise (remember *The Natural*?). Moderate environmentalism—which used to be known as "conservationism"—is immensely popular in America today, and

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for very good reasons. But to be moderate, environmentalists must concede that development is at least sometimes legitimate, and that reasonable people can often choose between the alternatives differently. Ethical environmentalists are too often unwilling to concede this; as a result, they too often lack confidence in the democratic electorate and in the decisions of the representative government that it produces.

Rights and consent

The attempt to bestow rights upon nature (which cannot consent) thus reveals itself as an attack upon representative government (to which the people can consent). And the attack follows from a loss of confidence in the reasonableness of human choices; in Tribe's words, respect for nature requires us to "move beyond [human] wants," to oppose "a system that has come to treat the individual human will and its wants as the center around which reason ... must revolve." Tribe is more eager for government to represent the hypothetical, unknowable wants of trees than the actual, discernible wants of people.

It is, of course, wrong to suggest that representative government always and automatically translates the people's wishes into the public's policy; its failure to do so points to the differences between representative and direct democracy. But it is one thing for the people's elected representatives to check the people's will, in the belief that the people need what Madison termed "a defense ... against their own temporary errors and delusions." It is quite another thing for this check to come from groups of private, unelected individuals on the basis of their supposed knowledge of the wants and needs of nature. Such a check is not an extension of the principle of representative government; instead it calls to mind the attacks made upon that principle centuries ago, by priests who claimed title to rule not as men's representatives but as God's.

Advocates of representative government have occasionally criticized the self-assertiveness of people secure in the knowledge of their rights and eager for their satisfaction; but they have also seen in that self-assertiveness a safeguard against priestly rulers who claim a supernatural knowledge of God's purposes or history's destiny, who think that their knowledge entitles them to ignore the people's express wants and the need to obtain their consent. Rule that reflects the self-assertiveness of ordinary men—vulgar though they may be—is rightly thought more decent and less dangerous

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than rule that reflects the intellectual superiority of extraordinary priestly men—elevated though they may be. Government by the people's representatives (who respect and for the most part reflect their desires), to which the people consent, is rightly thought preferable to government by a priestly elite (who think themselves above the people's desires), to which the people would not consent.

Human freedom and the death of God

Ethical environmentalists hardly pose a mortal threat to representative government, and I am certainly not writing to propose a *Kulturkampf* against them. Nevertheless, the analogy to the preliberal priesthood—suggesting as it does the quest for a superior entity in whose name the people's wishes can legitimately be overridden—is useful. Its usefulness is particularly apparent in Tribe's case, since he quite literally portrays ethical environmentalism as a response to the death of God.

Tribe begins his argument by contending that human freedom ought to be limited, which is why it is wrong for us to exploit nature: "We can be truly free to pursue our individual ends only if we act out of obligation, the seeming antithesis of personal freedom." The human capacity to treat nature as we wish must therefore be restrained: if "only human wants and needs" are thought to "hav[e] moral significance," then "human interests collaps[e] into a mere aggregation of morally arbitrary individual desires and preferences." Tribe then goes on to worry that

> once reason is no longer perceived as guided by the divine, it can no longer serve as master and must be relegated to the place of slave.... When God is absent, the "grand manipulator" must move the world not according to values divinely revealed but in accord with ends ultimately private to each person and empty of intrinsic significance because not derived through any dialogue beyond the self.

The first problem with this argument is its irrelevance to Tribe's desire legally to empower trees. One can grant that the death of God poses a serious problem for liberal democracies, but it is not clear how Tribe's proposal responds to it; Tribe wants only that *trees should be given standing, not that they should be worshiped.*

The second problem is the difficulty of squaring Tribe's pronouncement with other prominent tenets of his thought. Denial of absolute freedom, and concern about the impact of atheism upon morality, are eminently respectable positions; but they are also eminently conservative ones, and they are simply incompatible

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with the libertarian thrust of Tribe's positions on many constitutional issues. Jerry Falwell might plausibly assert that grave moral problems follow "once reason is no longer perceived as guided by the divine"; one can easily imagine him doing so, in the context of arguing for the constitutionality of prayer in public schools. Tribe, however, would simply reject this argument—his own argument—in that context; and he would be right to do so, given his libertarian concern that human "autonomy" should not be infringed upon.

But if the rule of human autonomy is to apply to so many other human actions, Tribe needs to explain why it does not also apply to human actions toward nature. If Tribe were genuinely concerned about the problems posed by unlimited freedom, one might suppose that he would endorse the constitutionality of legislation that seriously restricted access to pornography or that criminalized some forms of sexual deviance; but this is unimaginable, even though enacting such laws could quite credibly be presented as a justifiable attempt to restrict "morally arbitrary individual desires and preferences." To put this differently, if Tribe is so eager to prevent unnatural acts committed by men against trees, it is unclear how he can be so horrified by the prohibition of what can plausibly be considered unnatural acts committed by men against men.

On a practical level, Tribe's concern for the problem of the death of God thus reveals itself to be, shall we say, selective. Nevertheless, his historical account of the origins of the loss of belief, and its relation to environmental issues, is not without interest. Tribe suggests that the roots of our contemporary attitude toward nature "lie deep within the western philosophical and theological tradition," of which he then provides a sketchy overview.

One selection can serve to indicate both the core of Tribe's argument and the Woody-Allen-but-with-a-straight-face character of the name dropping in which he shamelessly indulges:

> In a classic reply to Sartre's heroic effort to find authenticity in the very emptiness [produced by the death of God], Heidegger saw in that existentialist stance only the haunting spectre of the human will willing itself in the void. The age inaugurated for philosophy by Kant and carried to its relentless conclusion by Nietzsche—the age of human will as the center of reality—seemed to Heidegger to lack a center, a point of reference from which the works of the will might be assessed.[2]

[2]Elsewhere in the course of his thirty-page essay Tribe also manages to squeeze in allusions to Plato, Aristotle, Aquinas, the Scholastics, Bacon, Hume, Bentham, Mill, Kant, Hegel, Schiller, Baudelaire, Wittgenstein, Horkheimer, and Faulkner.

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Transcendence and immanence

Tribe argues that our belief in the supremacy of the human will, which accounts for our supposed contemporary proclivity to despoil nature, follows from what he calls the secularization of transcendence. Christianity had taught that God was sovereign over both man and nature, which served to limit man's domination of nature. But with the decline of belief in the Christian God, there is nothing to stop man from transforming nature in accordance with his whims: "The premises of secularized transcendence deny the existence of anything sacred in the world and reduce all thought to the combined operations of formal reason and prudence in the service of desire."

What alternative can be found to the ethic of secularized transcendence? Tribe speaks of the competing ethic of immanence (the "sanctification of nature"), but rejects it. Tribe's opposition to immanence is motivated only in part by the obvious difficulty inherent in our somehow deciding to return to a pagan or pantheistic deification of nature. More prominent is a political motive: "Treating the existing order as sacred (or, in a secularized version of immanence, as immutable) might well relegate to permanent subjugation and deprivation those many who are not now among the privileged, freezing the social evolution of humanity into its contemporary mold." Here one sees at last the affinity between Tribe the environmentalist and Tribe the constitutional theorist. To be an immanentist is in effect to share in the alleged error of those who believe that the original intent of the Framers should guide constitutional interpretation; it is to believe that we should be guided by principles inherited from the past, rather than boldly and creatively inventing whatever principles we think will advance the goals of human equality and autonomy. The Nietzschean centrality of the will that Tribe claims to reject with respect to our attitude toward nature he very much accepts when it comes to the Constitution. Immanence—belief in either original intent or the sanctity of nature—has no place in his constitutional interpretation; one realizes with shock that even immanentists of the latter variety would oppose the unrestricted practice of abortion, believing as they presumably would that it constitutes a rejection of the natural progression from conception to birth.

Tribe makes this point explicitly in his 1985 book *Constitutional Choices*, while indicating that his attitude toward nature is quite

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Nietzschean itself. Speaking of abortion, Tribe argues that the "incorporation of the 'natural' into the 'legal' [is] in need of constitutional justification in light of the way in which such naturalism retards full equality for half the human race." When human equality as Tribe understands it comes into question, nature (which we should revere) somehow instantly metamorphoses into "nature" (which we are encouraged to ignore).

With respect to the environment, however, Tribe recommends an attitude that synthesizes transcendence and immanence. But there are several problems with this suggestion. First, immanence and transcendence appear to be mutually exclusive; a comprehensive philosophic account—such as that provided by Kant (though assuredly not by Tribe)—would be needed to explain how man can be above nature in some respects, but only a part of it in others. The mere wish to combine these seemingly irreconcilable views is not sufficient. Second, people would need a reason for adopting the synthesis, just as they would for completely accepting immanence. If secularized transcendence results from the death of God, the fusion of immanence and transcendence would require some sort of renewed belief in Him (or Her, or It, or Them). Tribe appears more comfortable alluding to Nietzsche and Heidegger than thinking them through and taking them seriously; even—and in a way especially—for them, belief cannot be willed *ex nihilo*, but requires some sort of basis.

As it happens, Nietzsche thought that he saw the germ of such a new belief in the superman that he envisioned; that is to say, he anticipated not a synthesis of immanence and transcendence, but a newly heightened and radicalized sense of man's transcendence of all the natural and divine limits that had previously been thought to constrain him. In this sense, Tribe's program, as I have already implied, is more Nietzschean or radically voluntarist than he may realize or be willing to admit. Insofar as men consciously decide to limit their dominion over nature, they act transcendentally; they freely choose not to exert the power over nature that they possess.

Thus the policies that Tribe advocates are manifestly transcendent. Although Tribe urges us to choose "processes ... which ... avoid a premise of human domination," there are none. Tribe himself invokes the "tradition ... of regarding man as responsible for the perfection of an always incomplete natural order"; but this is only to say that Tribe wants us to dominate nature by perfecting it in the good ways of which he approves, not in the bad ways

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(characteristic of developers) of which he disapproves. When Tribe delicately speaks of the "bringing of claims" (without saying who will bring them) to protect the rights of wilderness areas against development, one can assume that they would be filed by transcendent human beings. Tribe's proposed synthesis of immanence and transcendence is itself radically transcendent, pointing as it does to a human capacity to choose that nonhuman nature altogether lacks: as Tribe himself states in *Constitutional Choices*, we should "regard any ... incorporation of the 'natural' into the 'legal' as a deliberate *choice*, one by no means inevitable or inexorable."

I have noted that Nietzsche's solution (or one of his solutions) to the death of God was the superman. It is tempting to say that Tribe's counterpart to it is the judiciary, which he (like Stone) calls on to overstep the limits traditionally imposed upon it by the constraints of representative government. If in Tribe's view human wants have led to a tyranny over nature, then perhaps the judiciary, which by and large is free from their pressure, can reject their importuning and bring the tyranny to an end. Viewed in this light, the contrast that we previously observed between Tribe's environmentalism and his constitutional theorizing disappears; common to both is the willingness to disregard the wishes of the people, as expressed in the laws enacted by their elected representatives.

The fact of transcendence, of human domination, cannot be avoided; for all of Tribe's talk of a synthesis with immanence, the project begun by Stone and endorsed by Tribe amounts to substituting the transcendence of unelected judges and environmentalists for the transcendence of the elected representatives to whose rule the people consent. Tribe's argument does not, finally, reveal a profound concern for the loss of our faith in God; arguably it bespeaks instead the loss of his own faith in representative democracy. The problem to which he points may therefore lie less in our lack of respect for inanimate nature than in Tribe's lack of respect for human nature. As Tribe realizes, it is wrong to deify nature; as he may not realize, it is also wrong to deify judges.

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Environmentalism and bounty hunting

MICHAEL S. GREVE

OVER THE PAST two decades, Congress has increasingly come to rely upon private enforcement of public laws. One manifestation of this trend is the increasing number and scope of environmental "citizen suit" provisions, which permit private parties who have suffered no particular injury to enforce laws as "private attorneys general." With only one exception, all federal environmental statutes contain provisions that allow "any citizen" or "any person" to sue others for noncompliance.

Congressmen and others defend citizen-suit provisions, with considerable moral fervor, as an efficient and democratic mechanism that allows concerned citizens to redress social problems—such as environmental pollution—in which they have no immediate financial stake. In truth, however, private enforcement has less to do with efficiency or democracy than with interest-group politics. Private enforcement clearly benefits the enforcers: businesses pay environmental groups millions of dollars each year as a result of citizen lawsuits. Whether such suits benefit the environment is far less obvious.

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Bounty hunters and altruists

Advocates of citizen suits often point out that the United States, more than any other democracy, has historically relied upon the private enforcement of laws. The bounty hunters of the Old West are not the only examples cited. For much of the nineteenth century, some tax and tariff laws were enforced with the aid of private "informers." Private actions against government contractors suspected of fraud date back to the Civil War. And antitrust statutes passed around the turn of the century permit private enforcers to collect treble damages from violators. But the tradition of private law enforcement has not been remotely as unquestioned and unbroken as the advocates of citizen-suit provisions suggest.

It has always been recognized that it is exceptionally difficult to put private citizens to work for public goals and values. Private citizens are good judges of their own rights and interests, and can therefore be relied upon to right the civil wrongs that are done to them, such as trespasses or breaches of contract. But they are terrible at judging the interests of others, including and especially "public" interests. Private enforcers are driven by a desire to collect whatever rewards are offered, irrespective of the social consequences of their actions. This would not matter if all enforcement actions under a given statute were socially beneficial. But laws are usually overinclusive; they tend to prohibit at least some desirable or innocent activities, along with those that they rightly prohibit. The full enforcement of almost any statute, from traffic codes to meat-inspection laws, would bring more costs than benefits. Since private enforcers are indifferent to this consideration, they tend to overenforce the law.

The danger of excessive enforcement has traditionally justified leaving enforcement to the discretion of public officers. And when extraordinary circumstances—such as the difficulty of maintaining law and order in the vast and untamed West—made private enforcement seem desirable, executive officials remained in control of private enforcers by exercising discretion over the amount and payment of rewards. Public officials, in contrast to private enforcers, are subject to political pressures and sanctions, including removal, which let the public and its elected representatives express their preferences for more or less stringent enforcement. In addition, and more importantly, public officials face budgetary constraints that prevent overenforcement. Private parties, in contrast,

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do not depend upon appropriations and are therefore much harder to direct and, if need be, to discipline.

That is why private enforcement has always been used reluctantly, often as a last resort. Many of the historical experiments with private enforcement were very short-lived. Others, such as the Civil War provisions against procurement fraud, were repeatedly curtailed and so limited that they were rarely used. But for reasons that I will discuss below, environmentalist citizen-plaintiffs are subject to much less government oversight and control than traditional bounty hunters. Modern citizen-suit provisions, moreover, differ from previous experiments with private enforcement in another important respect. Citizen-plaintiffs are not permitted to collect rewards for protecting public goods and values. Statutory fines are payable not to the plaintiff but to the U.S. Treasury. But since Congress wanted private-enforcement mechanisms to be readily available and widely used, most environmental statutes do instruct courts to award attorneys' fees to plaintiffs "when appropriate." Fee-recovery provisions, however, are *not* intended to let enforcers profit from their activities.

It is important to understand why citizen-suit provisions prohibit bounties. Since private enforcers are prone to excessive and erratic enforcement, they need something to guide them. Bounty-hunter provisions create *economic incentives*—that is, they offer rewards commensurate with the presumed public benefits of enforcement. Environmental statutes instead aim to promote *altruistic motives*. Altruism, then, is to serve as a proxy for optimal economic incentives that would prevent excessive and erratic enforcement. In practice, however, altruism has failed to guide private enforcers.

The case of the Clean Water Act

In law reviews, judicial opinions, and the *Congressional Record*, citizen-plaintiffs are uniformly portrayed as unorganized, powerless, and driven only by a selfless concern for the environment. In reality, however, citizen suits are almost always brought by nationally organized, professional advocacy groups such as the Sierra Club Legal Defense Fund or the Natural Resources Defense Council (NRDC). Proving ongoing, site-specific violations of environmental standards is costly and difficult; often it cannot be done at all without the alleged violator's cooperation, which is rarely forthcoming. Few individuals have sufficient time, money, or incentives to overcome these obstacles. Environmental groups,

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in contrast, do possess sufficient expertise and resources to monitor how the Environmental Protection Agency (EPA) administers environmental statutes, and to take legal action when they consider it necessary.

In the early 1980s, a handful of environmental organizations organized a campaign to enforce one environmental statute, the Clean Water Act, against private industry. With the help of a seed grant, the NRDC established a self-sustaining enforcement program by recovering attorneys' fees and using them to fund future cases. Five advocacy organizations, including the Sierra Club Legal Defense Fund and Friends of the Earth, joined the NRDC's campaign. As a result, the number of citizen suits increased dramatically, as did the number of notices of intent to sue. (These notices, which must be sent to the alleged violator, the EPA, and state environmental agencies sixty days before a suit is filed, are better indicators of enforcement activity than actual suits, because they include the large number of claims that are settled before trial.) A 1984 study of citizen actions, conducted by the Environmental Law Institute, showed that 349 notices of intent to sue were filed between January 1978 and April 1984. Fully 214 of these were issued under the Clean Water Act after the beginning of 1982; claims filed by six environmental groups accounted for 162 of these notices. An analysis of EPA records shows that the EPA has received more than 800 notices of intent to sue under the Clean Water Act since April 1984. Environmental organizations account for two-thirds of these actions. Indeed, more than half of all notices have been filed by five environmental groups.[†]

The surge in private enforcement after 1982, which occurred exclusively under the Clean Water Act, did not result from the accidental preferences of environmental groups, a sudden deterioration of water quality, or a slackening of governmental enforcement. Environmentalists' concerns over a drop in EPA enforcement under the Reagan administration did play a role. But EPA enforcement of other environmental statutes also declined, without triggering a rush of private enforcement. The explanation is more prosaic: environmental groups came to realize that enforcement

[†]I have reported and analyzed the EPA's data on the enforcement of the Clean Water Act in a recent two-part Working Paper for the Washington Legal Foundation, entitled *The Private Enforcement of Environmental Law: The Economics of Extortion.*

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actions under the Clean Water Act are cheap to bring, easy to win, and financially rewarding.

The Clean Water Act prohibits all waterborne discharges not made in compliance with a permit. By the early 1980s, the EPA had issued thousands of permits. At the same time, regulations issued under the statute had created a record-keeping system that reveals each permit holder's specific violations of regulatory standards and permit conditions. It takes less than one day for environmental organizations to train student volunteers to scan these records and identify infractions. Record-keeping requirements drastically reduced enforcers' search and detection costs. They also created economies of scale: large numbers of companies can be served with identical, form-letter notices of intent, on which only the dates, names, and a few specifics have to be changed.

A second peculiarity of the Clean Water Act is that it allows private citizens to sue not only for injunctive relief but also to enforce the civil-fines provision of the act. District courts are authorized to enforce permit requirements and to impose civil penalties of up to $25,000 per day per violation. Legally, these fines are payable to the U.S. Treasury. But environmental groups usually threaten targets with an expensive and embarrassing trial, only to settle the matter for a substantially smaller sum—*so long as the defendant agrees to make the payment not to the Treasury but to an environmental group or cause.*

Environmental groups are typically reimbursed for more than their attorneys' fees and litigation costs, which are calculated on the basis of the going rates of for-profit attorneys and are therefore well above the actual costs incurred. In addition, environmental-law enforcers often obtain so-called "mitigation" or "credit" programs, to be paid for by the alleged violator in lieu of a portion of the fines. Such programs finance research projects on the effects of water pollution, grants to local or regional environmental organizations for educational or "outreach" purposes, grants for land acquisition, and the like. Credit projects virtually always involve payments—ranging from $20,000 to more than $400,000—to environmental groups. To conform with the claim that private environmental-law enforcement is altruistic, payments for credit projects usually go to groups other than (although frequently connected to) the enforcer.

Alleged violators agree to fund credit projects for several reasons. Unlike fines, such projects may be tax-exempt, and they of-

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ten are good for public relations. Private settlements also tend to be less visible to the public than governmental enforcement actions, reducing the firms' risk of being perceived as reckless polluters. But the primary reason for striking quick bargains with private enforcers is that they are much cheaper than either going to trial or dealing with EPA enforcement: defendants know that environmental groups will "trade" even a relatively modest credit project for otherwise very substantial Treasury fines.

Nonetheless, the settlements substantially benefit environmental groups. Individual settlements may range anywhere from a few thousand to more than one million dollars, only a fraction of which consists of Treasury fines. A review of consent orders entered in 1983 found that "an amount equivalent to about 400 percent of the penalties paid to the federal Treasury was paid to reimburse environmental groups for their attorneys' fees." In addition, credit projects are more common and account for a larger share of the total settlement value in settlements obtained by private enforcers than in those obtained by the government. While the EPA and the Justice Department permit such projects only under exceptional circumstances, environmental groups virtually always demand and obtain credit projects well in excess of the fines assessed. More than 90 percent of the penalties paid by industry in response to citizen suits in 1983 went to environmental organizations, not to the U.S. Treasury. And an analysis of twenty-nine cases in the period from January 1983 to May 1985 showed that more than 65 percent of a combined settlement amount of almost $1 million went to environmental organizations.

Public benefits, private rewards

The settlements obtained in Clean Water Act enforcement proceedings, and credit projects in particular, have sparked a spirited debate about the motives of citizen-enforcers. Industry representatives have denounced private enforcement actions as "hold-up operations" and "extortion"; environmental organizations have responded that they are genuinely concerned about the environment, and that citizen suits do not make them rich. This universal preoccupation with motives obscures the real problem with altruistic enforcement: its failure to maximize the public good. Contrary to the ostensible purpose of citizen-suit provisions, the scope and direction of private enforcement are *not* determined by the public

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environmental benefits to be gained, but by the private economic interest of the litigator.

We have already seen that the heavy concentration of enforcement activity under the Clean Water Act is attributable to the act's unique combination of low search and enforcement costs with high potential rewards. Likewise, of the 162 recorded enforcement actions brought by environmental organizations between 1978 and 1984, not one was brought against a municipal entity; and between 1984 and 1988, organized enforcers filed more than six times as many notices against private industry as they did against governmental entities. This imbalance cannot maximize environmental benefits, since water pollution by towns or sewage authorities is no less frequent or serious than that committed by private corporations. But the imbalance can maximize benefits to environmental organizations. A private corporation's capacity for fast, authoritative decisionmaking makes settlement negotiations less complicated and expensive, and potentially more rewarding, than negotiations with government officials who worry about the legality of settlements and about their accountability to the electorate. Actions against industry also have more public-relations value than actions against local governments; enforcement proceedings against government seem less of a "free lunch" to the public than actions against corporations, especially if taxes go up as a result of enforcement.

Similarly, environmental groups tend to target firms whose discharge records show multiple and recent violations. This strategy is *not* based upon environmental cost-benefit analyses; indeed, the groups rely upon student volunteers—instead of expensive economists and scientists—to select enforcement targets. Environmentalists focus on repeat offenders and recent violations because this, too, permits them to minimize costs and maximize rewards. Under the Clean Water Act and its regulatory progeny, accidental permit violations may be discounted as nonpunishable "upsets." And judicial interpretations of the act require citizen-plaintiffs to make a good-faith allegation of an *ongoing* violation. Private enforcers can keep enforcement costs low by avoiding complicated disputes over isolated violations and the time of their occurrence.

The list of private enforcers' successful efforts to reap economic rewards could easily be extended. A tiny group called the Atlantic States Legal Foundation, for example, has brought scores of actions, not over substantive environmental violations, but over vio-

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lations of the voluminous paperwork requirements of the Clean Water Act. These actions generate no discernible environmental benefit, but do bring the group tens of thousands of dollars in attorneys' fees. In short, the targets of private enforcement are not necessarily the parties who did the most damage, but rather those who are likely to accede to substantial settlement demands.

One may be tempted to ascribe this phenomenon to less-than-altruistic motives. But this would miss the fundamental problem: even the best-intentioned private enforcers, as long as they face some budgetary constraints, will invariably be guided by the costs and benefits of litigation *to themselves*, not to society. Private attorneys general do not know the costs of violations or the public benefits of enforcement better than anyone else. Moreover, private attorneys general must choose among enforcement targets, and should worry about an optimal level of enforcement. Since social costs and benefits are highly uncertain, even the best-intentioned private enforcers can calculate them only impressionistically. The only factors that they *can* assess with certainty are their own costs and benefits.

Of course, this limitation applies to victim-enforcers as well. But victim-enforcers possess well-defined private rights. Victim-enforcers can make a competent choice between taking their cases to court, settling, or simply ignoring the breaches and getting on with their lives. They can compare the possible costs of litigation to the damages they suffered and to the benefits they hope to gain from trial. They need *not* calculate social costs and benefits, which are much harder to assess. Nor need they choose between possible enforcement targets; they will enforce the law only when they have been victimized, and only against those who they believe have victimized them. Hence victim-enforcers, in contrast to private attorneys general, are highly unlikely to overenforce the law.

Private choices, public control

Proponents of environmental citizen suits respond that private attorneys general should be compared not with victim-enforcers but with the government. They argue that private citizens may be better situated than the EPA to recognize an immediate problem in a given locality. By addressing types of violations that tend to escape the EPA's attention, private enforcement could thus fill gaps in the government's enforcement program, while leaving

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public officials in charge of designing and implementing that program. Provisions in several environmental statutes direct private enforcement toward ongoing, localized pollution, and away from past pollution.

Whenever doubts are raised about the legal or substantive merits of citizen suits, congressmen and environmental advocates claim to want nothing beyond this limited conception of subordinate, "gap filling" private enforcement actions. But the actions that citizen-suit provisions have produced are wholly unlike those that Congress purportedly intended to bring about. Private enforcement has not been directed, as ostensibly intended, against local violations that tend to escape the EPA. If citizen suits served this purpose, they would typically be brought by individual citizens or *ad hoc* neighborhood associations. Instead, private environmental-law enforcement is the domain of national advocacy groups, which are no more attuned to local conditions than the EPA. Since these organizations try to minimize their costs, moreover, they act only when the government and private industry have already paid a substantial portion of the enforcement costs. They direct their energies *away* from discovering the violations that tend to escape the EPA, because such investigative efforts are expensive. Instead, they focus on the retroactive punishment of known violations (primarily under the Clean Water Act), which requires only record scanning.

In short, when payoffs are unavailable, environmental organizations stay out of the market, and private enforcement adds little or nothing to governmental enforcement; this has been the pattern under every environmental statute except the Clean Water Act. When payoffs *are* readily available, the ensuing flood of complaints may well eclipse governmental enforcement. This has happened under the Clean Water Act, leading to what the congressional authors of environmental legislation ostensibly sought to prevent: a shift in control over enforcement priorities from public to private hands.

Congress is well aware that private enforcers do not bring the types of cases they were ostensibly supposed to bring, and that private suits are normally brought not by concerned citizens but by professional lobbying and litigation groups. The Clean Water Act enforcement campaign has been examined by the EPA and in a widely used, government-funded study. It was also the subject of extensive congressional testimony during the 1987 revision of the act. Yet Congress has done nothing to bring private enforcement

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more closely in line with the enforcement pattern it purportedly sought to bring about.

It could do so in a very simple way: like the bounty hunters of lore, private attorneys general could be treated as the government's deputies. They would possess full governmental powers, but the Department of Justice would control and steer private enforcement. It would have the power to preempt citizen suits by issuing a simple notice to the parties and to the court that enforcement is undesirable. Fee-recoveries and credit projects would be abolished; in order to entice private enforcers, the government would make discretionary grants for enforcement actions to environmental groups or, for that matter, to bounty hunters.

But Congress has not adopted and will not adopt this simple model, precisely *because* it would preserve governmental control over the enforcement process. Congress entertains a reflexive suspicion that the executive, if left to itself, would systematically underenforce the law. It was this distrust that led Congress to give private enforcers the responsibility not only of filling gaps but also of prodding the government into tougher, more aggressive enforcement. Private attorneys general are still not quite on a par with the government, for citizen suits are automatically preempted by governmental enforcement measures. But only by starting its own "diligent enforcement" action can the government stop private enforcers. Moreover, Congress gave control over fee awards and penalties to the courts, not the executive.

Yet governmental control over enforcement priorities is incompatible with a broad "prodding" role for private enforcers. One might argue that the executive is not trustworthy, and that private parties are better judges of the public good. But if so, why should the government retain control over the scope and direction of enforcement, as Congress continues to insist? Conversely, one might contend that government has to set priorities, leaving private enforcers to fill the gaps. But one must ask how, on this theory, private enforcers can prod the government—as they have done under the Clean Water Act—*without* changing its priorities.

Since the government cannot stop citizen suits by any means short of instituting its own "diligent" proceedings, private parties can force the government into enforcement actions, including pointless and counterproductive ones. At the same time, the Justice Department insists that citizen suits and private settlements do not bar the government from bringing its own suits over the same

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violations. It must so insist; otherwise, it could not remedy inadequate private settlements, or effectively ensure that at least a portion of the assessed penalties goes to the U.S. Treasury instead of to credit projects. Given the Department's position, however, violators are confronted with the possibility of what amounts to the civil equivalent of double jeopardy. Moreover, the government's position weakens the bargaining leverage of the citizen-plaintiffs who act on its behalf: a private settlement that may subsequently be upset by the government is worth less to an alleged polluter than a final disposition of the charges. Consequently, settlements are reduced, and the law is selectively *under*enforced. It would be pure coincidence if the net result were an optimal level of enforcement; erratic enforcement is much more likely.

More likely than not, private enforcement of the Clean Water Act has reduced industry's incentives for voluntary compliance with the law, thus necessitating additional private and governmental investment in enforcement. It may also have impeded technological innovation by making permit holders prefer fail-safe equipment to more advanced gadgetry that, although more effective, is untested and may lead to technical violations. And it may have given potential enforcement targets incentives to pollute the air and the land rather than the water, or to channel discharges into already overloaded municipal wastewater-treatment facilities. Depending on the extent to which these effects have occurred—and they have occurred at least to some extent—private enforcement may have done more environmental harm than good.

In contrast, a system that would truly subordinate private to public enforcement might help improve the environment. It would permit extensive private enforcement without endangering the government's control over the enforcement process; and it would end payoffs and greatly reduce the threat of excessive and erratic enforcement, while allowing private enforcers to collect adequate rewards and securing the environmental benefits that allegedly result from private enforcement. The government, however, would have to be allowed to refuse payment of rewards for useless cases, and for private enforcement actions that do not fit the government's priorities.

Public "underenforcement"

Environmentalists and their patrons in Congress argue that, whatever problems private enforcement may pose, they are far less

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worrisome than the disastrous consequences of the EPA's permissiveness. The EPA's allegedly lax and insufficient enforcement efforts are sometimes ascribed to a lack of resources; more frequently, they are blamed on the agency's supposed recalcitrance, foot dragging, and solicitude toward corporate interests. Either way, private enforcement is said to compensate for governmental underenforcement.

On this theory, private enforcement would make some sense, even in its current form and with all its distortions. If one assumes that more enforcement is automatically better enforcement, it no longer matters how many private enforcers enter the market and what choices they make. But this argument proves too much. If we knew environmental statutes to be underenforced, it would not make sense to prohibit *profitable* enforcement. Why should the enforcers' motives matter, if we know that every additional enforcement proceeding generates environmental benefits?

The problem with the assumption that more enforcement is always better enforcement is that environmental statutes are excessively ambitious. Toxic-waste laws, for example, require cleaned-up waste sites to be less "toxic" than nature itself. Similarly, the Clean Water Act establishes a legal standard of *zero* discharge; its official goal is not to eliminate harmful pollution but *all* pollution, however harmless and insignificant it may be, and however expensive its prevention. Other objectives required by environmental laws, even if desirable and attainable, could be achieved only at enormous cost. In addition, many environmental statutes ignore the goals—such as economic growth—that compete and conflict with maximum enforcement.

Since the necessary trade-offs have not been made at the legislative stage, they must be made in the enforcement process. The most basic and effective way of forcing trade-offs is the very lack of resources that Congress persistently cites to prove governmental underenforcement and to justify private enforcement. This "lack" does not signal underenforcement. It means that we prefer to spend existing revenues on something else, and that we are unwilling to impose a tax to finance additional enforcement. In other words, the existing level of governmental enforcement reflects the costs that we are willing to pay to improve the environment.

Especially under Republican administrations, members of Congress are much given to berating the EPA for its "lax enforcement." But this is mostly demagoguery. Congress often directly

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assures less-than-full enforcement—for example, by exempting public projects from review under the National Environmental Policy Act or by suspending the imposition of penalties under the Clean Air Act. Even if Congress really believed that more enforcement would be unambiguously beneficial, it could remedy a "lack of resources" by raising the fines under environmental statutes, or by increasing the EPA's enforcement budget. This would be easier and more effective than the use of private attorneys general, whose decisions are hard to predict and even harder to control and correct. It would, however, entail responsibility for inconvenient trade-offs and unpopular results, and it would no longer permit legislators to confer benefits upon a political constituency.

Creating an enforcement cartel

And the conferral of benefits is precisely what makes private enforcement attractive to Congress. If Congress really believed in the superiority of altruistic enforcement, it could simply prohibit credit projects and attorneys' fees in excess of actual costs, thereby ensuring that private enforcement did not benefit environmental groups. This reform would end both the dominance of environmental organizations over the enforcement process and the heavy concentration of enforcement activity under the Clean Water Act. But Congress has never contemplated such a step.

Charitably interpreted, its reluctance to abolish credit projects and excessive reimbursements for attorneys' fees reflects a genuine dilemma: while Congress wants the scope and direction of enforcement to be determined entirely by the potential public benefits, it also wants private enforcement to be extensive. The problem is that one cannot preclude *remunerative* private enforcement without running a serious risk of eliminating virtually *all* private enforcement. Rather than taking this risk, Congress has come to tolerate attorneys' fees and credit projects—a currency valued almost exclusively by the environmental movement.

The prohibition of other profits limits not the number but the *type* of enforcers. Simply put, Congress's policy is to lure environmental organizations into the enforcement market, while keeping everyone else out of it. The practical result is an enforcement cartel consisting principally of the environmental movement. This effect, indeed, may be the only reason that profits—but not credit projects—are prohibited. For as we have seen, the fact that rewards take the form of credit projects does nothing to ensure that

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private plaintiffs select the right targets and the right level of enforcement.

It is true that the creation of an environmental-enforcement cartel may not have been the original purpose of citizen-suit provisions. The Clean Air Act of 1970, which was the first environmental statute to permit private enforcement, was passed in a great hurry and in a very emotional atmosphere. The citizen-suit provision was inserted at the last minute and maneuvered past congressional committees by Senator Edmund S. Muskie, the main sponsor of the act. Near-identical provisions were later written into almost every environmental statute, with mechanical regularity and again without much deliberation. In 1970 Congress may have believed that enforcement proceedings would ordinarily be brought by individual citizens or neighborhood associations, and not by environmental-advocacy groups (most of which were young and small then, and which were less numerous than they are today). On the other hand, environmental lawyers with close ties to the existing groups played a significant role in designing the Clean Air Act and its citizen-suit provision, and did want environmental organizations to have a hand in law enforcement.

In any case, environmental groups, Congress, and the EPA now know, and have known for some time, that these provisions do more to assist environmental organizations than to reduce pollution. The effect of the seemingly technical provisions that reduce search and enforcement costs—such as requirements governing record keeping, data collection, and public access to information—is to advance the environmental movement. That is precisely why such provisions have proliferated. The biggest single accomplishment in this respect is Title III of the 1987 Superfund Amendments, which may eventually allow private enforcers to discern any violation of any environmental statute with the same ease with which violations of the Clean Water Act can now be detected and prosecuted.

This development of environmental law is but one example of the proliferation of private rights to file suits that obstruct decisions in many policy areas. These rights let political advocacy groups further their own agendas while making others foot the bill. Under the Community Reinvestment Act, for example, which compels financial institutions to be attentive to the needs of the communities that they serve, anyone may submit to the regulatory authorities objections to bank mergers, acquisitions, and branch

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openings or closings. When banking deregulation triggered a flood of such transactions, the statute became a bonanza for self-proclaimed community groups. Since objections result in protracted and expensive administrative proceedings, financial institutions must bribe community activists with low-cost loans and mortgages, donations for housing projects, and contributions to community groups. Similar schemes exist in areas ranging from broadcast licensing to surface mining to housing law.

One reason for this expansion of private enforcement is political: its beneficiaries are uniformly constituencies of the Democratic party, which has come to endorse compulsory philanthropy as its idea of voluntarism. This partisan motive, moreover, dovetails nicely with Congress's institutional interest in escaping political accountability. As long as the law is enforced by the government or by bounty hunters, Congress can prevent undesired results only through a legislative selection of priorities. This is inconvenient; it involves unpopular trade-offs and the resolution of conflicts among a multitude of interest groups. The current system of private law enforcement is politically far less dangerous. Congress simply demands zero pollution, facilitates the enforcement of that attractive but chimerical standard by the constituencies that agitated for it, and disavows responsibility for the results.

The whole point of the separation of powers was to make such maneuvers more difficult. As long as Congress cannot enforce the laws it passes, it must be reasonably certain that they will be beneficial even when enforced by a president with a different political base and different institutional ambitions. Of course, Congress has always influenced law enforcement through appropriations, oversight, and other means. But the separation of powers keeps Congress at least one step removed from the actual process of law enforcement. Now that Congress has conferred enforcement powers upon some of its constituencies, public administration has come to mirror Congress's worst institutional proclivities. Since Congress is the playing field for factions, its involvement in law enforcement is an exceptionally partisan, constituency-serving affair. And since legislators cannot be held individually responsible for bad results, they pay no price for the zealotry of their constituencies.

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The free market and the environment

RICHARD L. STROUP & JANE S. SHAW

CONVENTIONAL economic wisdom, in a theory first propounded by Nobel laureate Paul Samuelson, holds that the unregulated market cannot be expected to protect the environment. In this theory, clean air and water are "public goods" whose value is not well reflected by market processes. Potential polluters do not consider the social costs of their actions, but only the costs to themselves; in addition, since efforts to maintain a clean environment benefit even those who do not help fund them, each individual faces a strong temptation to avoid footing the bill. Similarly, when markets cannot immediately reflect the benefits of preserving biotic diversity or of saving individual species, private landowners may not be willing to pay for socially beneficial preservation. In the absence of government intervention, the argument goes, the environment will therefore be insufficiently protected.

This analysis has become so accepted that many people now see no alternative to the system of government environmental regulation and control that has been pieced together over the past two decades. This system, however, is beset with difficulties; for when

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environmental goals and controls are politically determined, they are subject to a process that is often driven by groundless accusations, supported by public fear, and legislated with special interests in mind. Populist sentiment and pork-barrel politics, rather than actual environmental dangers, currently determine priorities.

We should therefore be prepared to reconsider the free-market solution to environmental pollution, which has worked in the past and could be made to work better now. Over the long run, private ownership is the most effective protector of the environment—provided ownership is transferable and backed by courts that make people liable when their pollutants invade the person or property of others. This system of private ownership would protect the environment for the same reason that it protects other kinds of property: because it encourages good stewardship.

Love Canal

The contrast between the effectiveness of public and private environmental protection is well illustrated by the case of the most notorious toxic-waste dump in American history—Love Canal. The story, which was not fully known until Eric Zuesse uncovered it in *Reason* in 1981, begins in 1942. The Hooker Electrochemical Company started dumping chemical waste into the abandoned Love Canal, after lining the canal with impermeable clay to prevent the chemicals' escape. After the canal was filled, a clay cap was installed over the top, sealing the chemicals' "tomb" so that rainwater could not wash the chemicals out. Hooker's precautions were extremely thorough. In fact, the Chief of Hazardous Waste Implementation for the Environmental Protection Agency said in June 1980 that they would have met even the stringent 1980 Resource Conservation and Recovery Act regulations.

Around 1950, the Niagara Falls school board, searching for a site for a new school, inquired about Love Canal. Hooker warned it about the chemicals, and gave school-board representatives a tour of the site, even making test borings into the ground to demonstrate that chemicals were indeed present. Despite warnings of liability from its own attorney, however, the school board, eager to get the site, prepared for eminent-domain proceedings. Under these conditions, in 1952 Hooker donated the site to the school board in return for $1. Hooker insisted on noting in the transfer papers the presence of and potential danger from the chemicals

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sealed below. Private ownership, and the liability of the owners, had ended.

The school board subsequently built the school and scraped away part of the clay cap to provide fill dirt for other school sites. The scraping was sufficiently extensive that construction plans had to be changed in order to avoid the partially exposed chemicals. Rain could now get into the dump.

In 1957, over Hooker's strong public objections, the board tried to sell the remaining land. Hooker won that fight, and the land was retained temporarily. At about the same time, however, apparently without Hooker's knowledge, the city constructed a sewer line, surrounded by permeable gravel, that punctured both the clay walls and the cover of the canal. A storm sewer was placed through one wall of the canal in 1960, again in a bed of gravel. These and later punctures that occurred when the state built an expressway through the site meant that incoming rainwater could carry the stored chemicals freely through nearby neighborhoods along the gravel beds of the sewer pipes.

The area around Love Canal, sparsely populated when Hooker used the dumpsite, gradually became residential. The school board sold the south end of the site, where the chemical wastes were concentrated, for residential development. The escaped wastes began to invade the neighborhoods, and the disaster hit the national press.†

But the press paid little attention to the history of the property rights. Hooker was judged guilty by the press and the public, and Superfund was born. This law, enacted in 1980, created a $1.6-billion fund—financed by a tax on chemical and oil producers—for cleaning up abandoned waste sites. Expanded by $8.5 billion in 1986, Superfund has become an expensive, wasteful pork barrel that has accomplished little cleanup. "All sides agree that the Superfund program for cleaning up hazardous wastes sites is not working as intended and that progress on permanent cleanups has been painfully slow," former Environmental Protection Agency administrator Russell Train wrote earlier this year. A Rand Corporation study recently came to the same conclusion.

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†To this day, despite many detailed health studies, there is no generally accepted evidence of a threat to long-term human health from living in the neighborhood, despite the obvious presence of noxious pollutants. It is still possible that serious long-term risks will eventually turn up, though the evidence to date is against that possibility.

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Had Love Canal remained in Hooker's ownership, the chemicals would probably never have escaped—or if they had, they would have been rapidly contained—and a national trauma and a multibillion-dollar tax would have been avoided. When Hooker owned the site, company managers had a powerful economic incentive to act responsibly. Liability laws made clear that Hooker would be liable for harm caused by the waste; and since stock prices reflect expected profits and losses, both stockholders and the responsible managers (through the impact on their professional reputations) would pay financially and personally as soon as it was evident that their actions caused harm. But the members of the school board, like public officials generally, did not have the same personal or financial accountability for their actions. Perhaps that is why they allowed their desire for a cheaper school and their desire to sell surplus land for development to override whatever personal concern or caution they may have had.

Property rights and accountability

When backed by effective liability laws, private property rights tend to work well. Because well-tended property increases its value, private owners generally take care not to despoil their land. This safeguard works even when owners care only for themselves, not for their heirs. For at the very first signs of poor stewardship—the first indications of land erosion, for instance—appraisers and potential buyers can project the results into the future, and the value of the property declines immediately.

Contrary to the arguments of those who favor extensive government regulation of the environment, this theory applies even to land owned by a corporation and controlled by corporate officers rather than owner-stockholders. Corporate officers who do not expect to be present when future problems arise will be concerned mainly with the short term. But if current actions are known to cause future problems, or if current expenditures are seen to promise future benefits, changes in stock prices will reflect the expected results. Even the rumor of future benefits or expenses can strongly influence today's stock prices, so that short-sighted decisionmakers will feel the effects of their actions immediately.

With an effective liability system, these pressures can also keep corporations from despoiling land or property that they do not own. Although disputes occur, the obligations of those who harm others'

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property are so widely accepted that people may not even have to go to court when their cars are damaged; insurance companies generally handle such cases routinely.

Unfortunately, environmental damage is often not as recognizable as a dented fender. Common law requires plaintiffs to prove damages and identify the responsible parties, and though the standard of proof is not as high as in criminal cases, it remains substantial; in order to sue you successfully for polluting my lungs, I must show that I suffered the damage for which I am demanding compensation, that the cause of the damage was air pollution, and that your factory was the source of the pollution. Without reliable information on which to base such damage suits, owners cannot adequately defend their property rights in court. If the air could have been contaminated by many different sources that may be hard to identify, or if the health effects are hard to measure, I may have trouble convincing a court that you should compensate me.

Thus the nature of emissions can make liability laws unenforceable, particularly in the case of air pollution. The difficulty of obtaining satisfaction in court was, in fact, an important factor creating pressure for government intervention to control pollution. But government intervention does not eliminate the need for accurate information. Like private individuals, the government has trouble knowing the source and effect of pollutants. Unfortunately, it has therefore tended to adopt standards that do not demand solid evidence connecting emissions with harm. Under today's regime, the mere suspicion of harm, combined with educated guesses as to the source of pollution, are driving policies that have enormous costs. Los Angeles, for example, is about to impose measures to require reformulation of products such as deodorants and paints and conversion of cars so that they run on methanol rather than gasoline. These controls are based on the supposed health effects of air pollution, yet scientists have not found credible evidence that air pollution, even at the levels found in Los Angeles, has caused long-term health effects. Nearly everyone deplores the visual pollution over the Los Angeles basin; but the real problem may be aesthetic, not health-related. If so, a different mix of controls would probably be more effective and less costly.

Not only does the government lack the necessary information for controlling pollution, but politicians often have little incentive to obtain it. Politicians find it easier and more popular with most constituencies simply to adopt a stance of outrage against polluters.

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In fact, generating outrage is an effective way to generate votes. The passage of Superfund boosted the careers of a number of congressmen, even though it resulted from misinformation about Love Canal and the incorrect implication that every town had a potential disaster in its backyard.

At the same time, the political process often undermines the stated goals of environmental laws, as Bruce Ackerman and William Hassler have illustrated in reviewing the Clean Air Act amendments of 1977. The amendments required electric utilities to install expensive scrubbing devices to reduce sulfur-dioxide emissions, even though in many cases emissions could have been reduced more cheaply and more effectively by using cheaper low-sulfur coal. By insisting on scrubbers, the companies that produce high-sulfur coal and their unions froze out competition, especially since some of the required scrubbers do not even work when used with low-sulfur coal. Furthermore, Robert Crandall has pointed out that politicians from Eastern and Midwestern cities used the amendments to stifle competition from the Sun Belt by insisting on tighter controls on undeveloped areas.

Ironically, before the major federal environmental laws were passed, advancing technology was itself cleaning the environment. Air quality was improving, partly because of the profit motive. For example, an early device for measuring air pollution, the "Ringelmann number," was developed as a tool for improving fuel economy. Black smoke indicates that combustion is only partial, and thus that fuel is being wasted. The Ringelmann number gauged the extent of fuel waste by measuring the density of smoke, and early air-pollution laws used the number to specify the density of smoke allowed from smokestacks.

Technological innovations may be hindered by government control. This is clear in the case of water pollution. In America streams and the fish in them are owned by the states, so no individual owners have legal standing to protect the water against pollutants. The advent of federal controls on water pollution has led to complex, industry-specific technical standards for controlling emissions into streams. These bureaucratically administered standards are costly and tend to retard technical advances; and they do not even address a major source of pollution, "nonpoint pollution," usually caused by agricultural run-off.

On the other hand, where private ownership can be established, pollution control can be quite effective. In Great Britain, although

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streams are publicly owned, fishing rights are privately held. Owners of fishing rights tend to keep streams clean and well-tended, and anglers' associations have successfully gone to court to protect streams from pollution. They succeeded in stopping pollution before pollution control became an important political issue. The precedents that they established stand today; potential polluters recognize that they are likely to be held accountable in court for any damage they do, and that injunctions can be issued against them if their actions threaten fish.

Problems with government control

The political pressures that dominate government work against taking the long view. Government officials are legally barred from personally capturing any value that they help create; correspondingly, they pay no financial penalty for property that deteriorates. By contrast, a private owner of land will see its value change immediately after a major investment, because the value reflects future benefits and costs stemming from his action. Since no such "capitalized value" exists in the government setting, government officials are more interested in maximizing political power than economic value. Their interests often figure in controversial decisions. Henry Clay's remark that he would "rather be right than be President" is famous because it represents an unusual elevation of principle above personal success in politics; and, of course, Clay never did become President.

It is true that government officials are usually well-intentioned. But pursuing their professional mission almost inevitably means disregarding some goals important to the public interest and catering instead to specific individuals and groups. The dedicated (but narrow) professionalism of public officials—together with their need for political allies at budget time—often leads to their agencies being "captured" by the special interests that they ostensibly regulate. Which special interest prevails usually depends on how the political winds blow.

The results can be seen in the way that agencies manage the properties entrusted to them. For example, Forest Service foresters tend to be highly committed to harvesting and replanting trees, often neglecting the potential value of the national forests for recreation. This commitment has led the Forest Service to log extensively areas such as the Rocky Mountains, where the timber value

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of the trees is low and where the environmental harm from extensive cutting can be severe. A perverse result is that the harvested trees command prices lower than the cost to the taxpayer of cutting them down. According to environmental consultant Randal O'Toole, for example, the Gallatin National Forest in Montana loses between $2 million and $4 million per year on timber sales. Environmental organizations such as the Wilderness Society have lobbied against such pointless destruction for some years, but the political power of sawmills and their workers, backed by Forest Service officials' commitment to timber cutting, has prevented change.

Indeed, Environment Probe, a Toronto-based environmental organization, recently reported that governments worldwide tend to encourage logging, even while private owners are trying to preserve the trees. Lawrence Solomon, the organization's executive director, wrote in the *Wall Street Journal* that Sweden requires private landowners to harvest at least half their trees within a decade after they mature; during the past decade Brazil's government has subsidized the deforestation of an area larger than France; and the government of Ontario is trying to persuade private owners to clear small woodlots while government-owned forests are being sold to loggers for, on average, a mere 85 cents per tree.

Politics also affects our national parks. The National Park Service generally follows the views of the leaders of prestigious environmental groups, even though the policies that this small minority espouses are not necessarily those that most Americans want. In his book *Playing God in Yellowstone*, Alston Chase has documented the deterioration of rangeland and the disappearance of wildlife in Yellowstone National Park that has resulted from the "natural regulation" or "hands-off" management of most of the park's land. "Hands-off" management has resulted in the largest elk populations in history, to the point that the land cannot sustain animals such as the antelope, beaver, and grizzly bear. Similarly, the decision to allow fires to burn in spite of decades' worth of fuel buildup led much of Yellowstone to be devastated in the summer of 1988. While environmental leaders endorse these policies because they minimize human intervention, the disappearance of wildlife such as the beaver and the grizzly bear disturbs many people. One reason the harm is so severe is that it follows decades of the opposite extreme—extreme intervention, during which park rangers killed off Yellowstone's wolves and suppressed all fires.

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The point of these examples is that government ownership and control leads to decisions determined by political muscle, not necessarily by wise judgment. Other examples of destructive or at least questionable government actions abound. For many years, the Bureau of Reclamation built costly dams that flooded thousands of acres of habitat. Today, feral horses and burros are harming federally owned rangelands, but they cannot be controlled because of opposition from animal-rights groups. And until recently, the Bureau of Land Management, which oversees rangeland, was routinely using crawler tractors to pull up bushes and small trees in large stretches of grazing land, despite a low cost-benefit ratio on much of the land.

Improving the common law

In short, the government record in controlling pollution and preserving habitats is not impressive. To control pollution, our chief priority should be to improve the common law. The common law, of course, has its flaws; nevertheless, its rules of evidence and its history of evenhanded protection of individual rights make it in most cases the best vehicle for holding accountable those who damage the environment.

We should begin by recognizing that many of the common law's failings were introduced by the legal activists who have been working to change the system since the 1950s. According to a number of analysts, courts today tend to compensate victims from whatever "deep pocket" might be found, even if the deep pocket (such as Hooker Chemical) acted responsibly. This approach destroys the link between liability and responsibility, and thereby reduces the incentive to take costly steps to avoid damaging others.

In recent years the search for deep pockets has led some courts to void insurance-contract clauses that explicitly specified and thus limited coverage. Partly for this reason, a number of insurance companies have stopped insuring hazardous-waste handlers, depriving industry of an important source of expertise. Similarly, when property has been sold, and the liability for hazardous materials simultaneously transferred by contract, the courts have sometimes voided that transfer, making all parties liable. This disrespect for contract reduces incentives to put hazardous properties into the hands of competent, solvent specialists.

One remedial step would be to restore the sanctity of contract, and to let insurers help control the risks from unintended pollution.

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Insurance companies have enforced safety in many industries while at the same time making safety cost-effective. In addition, governments could rely less heavily on direct regulation and instead require environmentally risky ventures, such as hazardous-waste dumps, to be bonded or insured; both bonds and insurance can provide the accountability that is otherwise absent when insolvency or bankruptcy prevents companies from compensating victims. A firm that has posted a large bond to guarantee solvency in case of liability claims will have a much stronger incentive to handle its hazardous materials safely and efficiently.

Increased emphasis on accountability through the common law could lead to other salutary developments. For example, chemicals that might escape into the water or air might be "branded" by dyes or radioactive isotopes to help identify their source. Responsible companies could protect themselves with branding, because they would be in the clear if contaminants that caused damage did not carry their brands. In addition, faced with laws that assure the solvency of potential polluters and that make liability more certain for anyone whose contaminants invade the property of others, insurers and others responsible for potential damages would provide a bull market for the development of better forensic technology, as well as better containment and decontamination procedures. When general accountability—rather than specific behavior—is stressed, the incentive to avoid damage is greater.

Private protection of the environment

When it comes to maintaining environmental quality, protecting natural beauty, and preserving wildlife habitats, private organizations have often done a better job than government. One reason for their effectiveness is that their actions do not have to reflect majoritarian views, which often change.

Private conservation, undertaken by voluntary associations, began long before the American public developed today's environmental consciousness or enlisted the government to protect endangered species and enforce cleanups. Hawk Mountain Sanctuary Association in eastern Pennsylvania, for example, was formed privately in 1934, at a time when hawks were considered vermin because they ate chickens. Sea Lion Caves, a tourist attraction on the coast of Oregon, began protecting sea lions in the 1920s, when the state of Oregon had a $5 bounty on each sea lion. At that time, the

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animals were viewed as pests because they ate fish and harmed the salmon industry; Sea Lion Caves provided a haven until public opinion changed and laws were passed to protect sea lions.

Even today, when the government is supposed to control the environment, private groups are responsible for much of the effective protection of wildlife. Hundreds of organizations—some operating nationwide, like the Nature Conservancy, and others more local, such as the Montana Land Reliance—act in a myriad of ways. The Nature Conservancy has more than a thousand nature sanctuaries, and since its founding in 1951 it has preserved some 2.4 million acres. The Conservancy carefully inventories land in order to target the most ecologically critical areas, which it then acquires and either manages directly or gives to government preservation agencies. The newer Montana Land Reliance, formed in 1978, keeps agricultural land from development, primarily through donated conservation easements.

Many private organizations manage sanctuaries and preserves. The National Audubon Society, for example, has more than sixty preserves, covering more than 250,000 acres. Ducks Unlimited protects more than a million acres of wildlands each year through easements that preserve waterfowl habitats. Operation Stronghold is a national association of private landowners committed to managing their land in a way that protects or enhances wildlife habitats. There are hundreds of other such sites in the U.S., providing refuge and habitats for all sorts of flora and fauna. There is even a preserve in Maryland that studies and protects butterflies, moths, and wasps.

The beauty of such private efforts is that people who do not care for wasps or egrets need not pay for their upkeep, as taxpayers do when the government is in control. Also, since private organizations do not use funds coerced from other people, but rather rely primarily on donations, they tend to target their efforts efficiently. And they can act quickly, without having to obtain government approval. Indeed, the owners of Hawk Mountain and the Sea Lion Caves were acting against both the conventional wisdom and the public policies in place at the time of their most important deeds.

So in spite of the "free rider" problem decried by Paul Samuelson, plenty of environmental groups—motivated by altruism, scientific curiosity, or love of natural beauty—are preserving scenic areas and wildlife habitats. While it is difficult to say whether "enough" environmental protection is provided, it is certain that a

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lot of protection is going on. Indeed, the free-rider problem is probably greater with each public policy aimed at correcting an environmental problem than it is with private environmental activity. The lobbying needed to create and maintain policies that reflect the public interest, rather than pork-barrel special interests, is a "public good" of the sort identified by Samuelson.

If the Audubon Society wants to preserve an important sanctuary, it must compete with other interests. That competition may be through politics or it may be through markets, but winning will probably be easier—and it will certainly be more permanent—through markets. In politics, the Society must use its funds to convince the majority of voters or their representatives that preservation is important—which might be difficult. In markets, however, its funds can be used directly for purchase. Ordinary commercial interests can usually be outbid for any specific tract, because many tracts can meet their needs for trees, oil, or scenery. If it had been necessary for Rosalie Edge, the woman who created Hawk Mountain Sanctuary in the 1930s, to convince politicians and their constituents of the importance of hawks, she might well have failed. Instead, she had only to convince a few backers to put up enough money to buy some acres on Hawk Mountain.

While private, nonprofit groups carry out much environmental preservation, environmental protection can also be a good commercial investment. International Paper Company, one of the largest private landowners in America, does much more than raise trees in its forests. It has an active wildlife and recreation program that offers camping and hunting facilities to individuals and clubs. The company employs wildlife biologists who work with foresters to improve animal habitats through such techniques as controlled burning and the creation of stream "buffer zones." The revenue from these efforts makes the company wary of disturbing the ecology, and willing to invest large sums to protect and enhance its wilderness and wildlife resources.

Throughout the West and Southwest, ranchers are finding that if they manage their land so as to have abundant game, people will be willing to pay for the chance to hunt. In Texas, for example, deer hunters buy leases costing from $100 to $2000 per person, and the returns to landowners are often greater than the returns from livestock operations.

As more people seek out scenic surroundings, protecting the environment will be an increasingly good investment. Big Sky of

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Montana, for instance, is a private resort that was created in the 1970s to provide a beautiful setting for homeowners and visitors in the northern Rockies. To maintain the natural beauty, the developers bought up more land than they intended to develop. They then resold the land with legally binding covenants that will keep the valley from being tarnished by unsightly buildings or incomplete construction. By protecting most of the valley this way, they increased the value of both the land that they developed and the land that they sold. Because they could buy and sell the land, a public good—environmental amenities in a large mountain valley—coincided with a private good—property values.

Public pressure in the past

Many people, of course, see private industry as the source of current pollution problems, not of their possible solutions. They point, for example, to the capitalists who cut down forests near the Great Lakes and failed to replant them. But what they fail to recognize is the high value of cleared land at that time, and the role of changing popular preferences. The same emerging desires that led to the Wilderness Act and the creation of the Environmental Protection Agency also energized the private sector—and brought about changes more rapidly than the government has.

Strong public pressure to control pollution is a relatively recent phenomenon; we often forget that smokestacks used to symbolize economic vitality, not irresponsible business. In the past, when people generally were poorer, they were less interested in preserving wildlands than in having food to eat and places to live. T. J. Iijima, in a paper prepared for the Political Economy Research Center, explains the destruction of the forests around the Great Lakes in terms of the popular demand for farmland and for lumber; understandably, there was little desire to keep virgin forestland. Even if the government had controlled the land, therefore, there is every reason to think that the forests would still have been cleared. (In fact, virgin forests in Michigan's Porcupine Mountains were nearly logged under Department of Defense contracts during World War II.)

As our standard of living has improved, our tastes for environmental amenities have increased as well. We can expect this demand for natural beauty to continue to grow as our national income increases, for attention to the environment is correlated with

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higher income. (Thus the advertisements in magazines published by environmental groups are decidedly aimed at the affluent—who are their readers, as the groups' own demographic surveys show.) We can expect the private sector—both profit and nonprofit—to continue to take the lead in meeting the increasing environmental demands whenever it is allowed to do so.

That does not mean that private organizations will solve all environmental problems. Where property rights are nonexistent, ill-defined, or unenforceable, there will be no owner to insist on protection. Rather than abandoning private management in favor of direct governmental control, however, we should try to find ways to establish accountability (along with the freedom and incentive to innovate) by establishing or strengthening property rights. We need to compare the problems stemming from imperfect property rights with the "solutions" put into effect by imperfect government. The evidence suggests that the political process has all too frequently caused waste and destruction.

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CORRECTION

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In the course of editing our Summer 1989 issue, we inadvertently inserted a serious typographical error into Isabel V. Sawhill's overview of the "underclass" problem. Among other measures, Dr. Sawhill proposed giving $5000 vouchers to childless high school graduates in impoverished inner-city areas. Sawhill's typescript estimated the cost of this program at less than $40 million; as printed, however, the essay pegs the cost at $40 billion. The error was entirely our own, and we apologize to Dr. Sawhill and to our readers.

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In praise of punishment

STANLEY C. BRUBAKER

IN AMERICAN political life, no one deserves praise more than Abraham Lincoln. And perhaps no one could express more clearly the character of Lincoln's political nobility than Frederick Douglass; having experienced the degradation of slavery, Douglas apprehended more fully the peaks of civic virtue. Thus, at the unveiling of the Freedmen's Monument in memory of Lincoln, Douglass delivered one of the most moving statements of praise in American oratory. The statement was devoid of illusions. Lincoln was, said Douglass, "pre-eminently the white man's President"; white Americans were his children, black Americans "at best only his step-children; children by adoption, children by force of circumstances and necessity." Yet the speech was replete with the sentiments of "gratitude and appreciation."

Douglass spoke with gratitude, for "though the Union was more to him than our freedom or our future, under his wise and beneficent rule we saw ourselves gradually lifted from the depths of slavery to the heights of liberty and manhood." And he spoke with appreciation, for

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Portions of this essay are taken from "Can Liberals Punish?," published in the American Political Science Review, *vol. 82, no. 3 (1988), pp. 821-36.*

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> taking him for all in all, measuring the tremendous magnitude of the work before him, considering the necessary means to ends, and surveying the end from the beginning, infinite wisdom has seldom sent any man into the world better fitted for his mission than Abraham Lincoln. His birth, his training, and his natural endowments, both mental and physical, were strongly in his favor. Born and reared among the lowly, a stranger to wealth and luxury, compelled to grapple single-handed with the flintiest hardships of life, from tender youth to sturdy manhood, he grew strong in the manly and heroic qualities demanded by the great mission to which he was called by the votes of his countrymen.

No less striking than Douglass's praise of Lincoln as the epitome of American virtue is his understanding of praise itself, and its role in the polity's civil religion:

> The sentiment that brings us here to-day is one of the noblest that can stir and thrill the human heart. It has crowned and made glorious the high places of all civilized nations with the grandest and most enduring works of art, designed to illustrate the characters and perpetuate the memories of great public men. It is the sentiment which from year to year adorns with fragrant and beautiful flowers the graves of our loyal, brave, and patriotic soldiers who fell in defence of the Union and liberty.

And for his mostly black audience, the new freedmen, to "join in this high worship, and march conspicuously in the line of this time-honored custom" was an occasion for "manly pride." For by this expression they were affirming their citizenship as well as their humanity. Thus Douglass both began and concluded his oration with congratulations to the new "fellow citizens":

> In doing honor to the memory of our friend and liberator, we have been doing highest honors to ourselves and those who come after us; we have been fastening ourselves to a name and fame imperishable and immortal; we have also been defending ourselves from blighting scandal. When now it shall be said that the colored man is soulless, that he has no appreciation of benefits or benefactors; when the foul reproach of ingratitude is hurled at us, and it is attempted to scourge us beyond the range of human brotherhood, we may calmly point to the monument we have this day erected to the memory of Abraham Lincoln.

In praising praise, Douglass echoed the ancient wisdom that a political community is constituted not simply as an alliance for property rights or for the sake of mere life—if it were, fragrant and beautiful flowers would not adorn patriots' graves, for there would be no patriots—but by a way of life and by the qualities of character that inform it. With story and stone, we celebrate noble

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deeds and noble people; we thereby make more manifest and enduring those qualities of soul that make for a political community. And we affirm that we are members of this community, for what we praise in others we must by implication esteem in ourselves. Through these rituals of praise we may more fully apprehend, appreciate, and affirm the beauty of soul that best expresses our community's way of life.

Punishment

We should understand punishment as a kind of mirror image of praise. If praise expresses gratitude and approbation, punishment expresses resentment and reprobation. If praise expresses what the political community admires and what unites it, punishment expresses what the community condemns and what threatens it. Punishment, like praise, publicly expresses our determinations of what people deserve.

There is no great novelty in this view of punishment. Much that I have said and will say is drawn from Aristotle. Similarly, Emile Durkheim wrote that "[punishment's] real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor." Among contemporary philosophers, Joel Feinberg has identified punishment with the "expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation." In this view, what punishment expresses is retribution, giving the criminal what he deserves. Retribution then defines as well as justifies punishment. Although such a view of punishment is not novel, it is unpopular among today's intellectuals, many of whom would proclaim with the psychiatrist Karl Menninger that "punishment" is itself a crime. Even more would agree with Justice Thurgood Marshall's seemingly enlightened judgment that "retribution has been condemned by scholars for centuries," and they would follow him further in thinking that "punishment for the sake of retribution [is] not permissible under the Eighth Amendment."

But if punishment is not "for the sake of retribution," can it still be punishment? I think not. We should distinguish punishment from related phenomena, such as *taxes*, *reparations*, *rehabilitation*, and *deterrents*. We should ask whether these latter phenomena can account for what we wish to say with our criminal sanctions, or whether the sanctions must instead be rooted in retribution. Perfectly sharp distinctions are not to be expected, for the phenomena

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blur and blend at the margins. Yet their central and distinguishing features are quite clear. Taxes and licenses, like punishments and penalties, may discourage activities, but they do not usually prohibit them. Laws that require licenses for or that impose taxes upon a course of conduct say that those who wish to engage in it must pay a fee or pass an examination; laws concerning punishments and penalties say that the conduct is impermissible. Here the distinction might blur; taxes may be prohibitive and penalties trivial, in which cases the messages are reversed. Usually, however, penalties and punishments are easily distinguishable from taxes.

Deterrent penalties, of course, lie closer than taxes to punishment, but they are still distinguishable from it. They announce that certain courses of conduct are frowned upon. But typically, as in ticketing drivers who marginally exceed the speed limit, the disapproval is less serious than it is when real punishment is meted out; less hardship is imposed, less shame is attached, we are held less rigorously to the mark, and violators are pursued less forcefully. Not uncommonly, the penalty is accompanied by other implicit messages that cushion its impact, assuring people that though they broke the law, they are not really bad: they are told that anyone might have done what they did, or that the penalty is a risk that they run for engaging in a certain line of conduct, and that for public benefit they must be held accountable. As these messages suggest, in framing penalties lawmakers often consider it reasonable to apply strict liability; whether someone did the action is the only question, not whether he was justified or made a mistake. But where punishment is involved, justification and excuse must be considered, and strict liability is virtually unthinkable.

This distinction points to the difference between deterrents and punishments. Deterrence works better when would-be violators know that they cannot slip through the system by faking an excuse or justification. Because the offender may in fact have had good reason or excuse, strict liability is occasionally unfair. But exactly because the offense in question is not thought "serious" (because it does not seriously reflect on the offender's character), the gain in deterrence outweighs the loss in fairness.

Rehabilitation, like deterrence, finds its justification in the future. It need have no essential tie to what was done or why; it concerns these things only insofar as they help rehabilitators assess what is required to prevent future criminal behavior. Because it has no essential tie to the crime, rehabilitation itself has no nec-

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essary proportion to the offense. If a criminal proves unresponsive to the methods of rehabilitation, he may, in consequence of a relatively minor offense, spend the rest of his life in a "rehabilitation center"; if he needs no rehabilitation or responds quickly to treatment, he may go free soon after committing a serious offense.

If penalties and rehabilitation focus on the future, punishment focuses on the past. In looking back, punishment resembles reparation. But reparation looks back in order to make the victim whole, and it does this typically as a matter of private law; reparation is not essentially a public concern. If punishment makes the victim whole, it does so metaphorically and incidentally; its essential concern is public.

Punishment, then, is distinct from a tax, a license, rehabilitation, reparation, or a deterrent penalty. What distinguishes punishment is the expression of resentment and reprobation, the expression of our deeply held conviction that criminals should get what they deserve: in a word, *retribution*.

Responsibility and judgment

Retribution in punishment, like gratitude and approbation in praise, pays tribute to man's distinctive capacity for moral responsibility; it declares that man is moved not simply by mechanical force or biological instinct, but by deliberate choice. If the "hero," like Woody Allen playing Boris in *Love and Death*, performs all his deeds inadvertently, we are unlikely to celebrate his character—even if his actions significantly benefit us. Similarly, if the accused has a satisfactory excuse (e.g., he made a good-faith mistake) or a justification (e.g., he acted out of self-defense), anger is inappropriate. Only if the person is responsible do we feel anger and seek revenge. As Walter Berns points out, "We can become angry with an inanimate object (the door we run into and kick in return) only by foolishly attributing responsibility to it, and we cannot do that for long, which is why we do not think of returning later to revenge ourselves on the door." Nor, we might add, can an offending animal hold our interest for long. (Here Captain Ahab would have to be excepted; but he was mad in a different sense.) Anger, like gratitude, presupposes essentially human attributes in its object, and directing it in an enduring way toward nonhumans can be done only ironically or insanely.

Anger, according to Aristotle, is "an impulse, accompanied by pain, to a conspicuous revenge for a conspicuous slight directed

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without justification towards what concerns oneself or towards what concerns one's friends." It is also, he noted, accompanied by a "certain pleasure" arising from the anticipation of revenge. While anger may stem from a conspicuous slight to oneself, the anger that underlies legal punishment concerns oneself and one's "friends" in a broader sense. It displays a caring for people and for principles that transcends narrow self-interest. It does not simply affix to the harm a person or a principle suffers; it also relates to how that harm was caused by a responsible human being, and to the attitude that he displayed toward the people and principles we care about. Punishment both expresses and satisfies our longing for vindication.

The criminal law, wrote James Fitzjames Stephen, gives "shape to moral indignation, and hatred of the criminal.... The sentence of the law is to the moral sentiment of the public what a seal is to hot wax." It gives proper form to anger, measuring it according to reprobation, to the judgment that the deed is shameful and deserves hard treatment in proportion to the gravity of the crime. This stern, measured judgment makes punishment what it is. As George Gardner observed, "The essence of punishment lies in the criminal conviction itself. One may lose more money on the stock market than in the courtroom; a prisoner-of-war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law." It is the condemnatory judgment alone, expressing the ideas of desert and righteous vindication, that renders "mere" hardship a punishment.

Similarly, it is the favorable judgment alone that differentiates benefiting someone from praising him. We praise and reward people to express our appreciation of their deeds and our admiration of the noble character that their deeds bespeak; in doing so, we elevate, display, preserve, and render more secure the things that we care about. We punish and blame people to express our resentment and disapproval of their deeds and our detestation of the ugliness of character that their crimes bespeak. Both in praising and in blaming we intend the deserved treatment to hit home and to sink in deep, *to mark our judgments of the person in virtue of the deed.* In this way rewards differ from compensation and incentives, and punishments differ from reparations and disincentives. Compensation and incentives, like reparations and disincentives, do not and are specifically intended not to reflect deeply on the person;

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they are largely external to the self. Though contemporary liberalism, as we shall see, has gone far to diminish the range of the self that can be publicly recognized, most citizens (for whom the self is more expansive) wish to mark its dimensions; they wish to erect monuments of gratitude to reward the greatest of heroes with lasting fame and to punish the vilest of criminals with death. *Praise and punishment thus reflect a vision of the moral order in which the virtuous flourish and the wicked suffer.*

The John Mack case

A recent case nicely illustrates the inability of deterrence, incapacitation, or rehabilitation—the commonly invoked "enlightened" justifications for criminal sanctions—to explain our fundamental sentiments about crime and punishment. In 1973 Pamela Small, then a college student in search of furnishings for her first apartment, entered a store in Arlington, Virginia, shortly before it was to close. When she discovered a flaw in the window blinds that she was about to purchase, the clerk, who was alone with her in the store, told her that there were other blinds in the storeroom and invited her to follow him to make her selection. Once there, the clean-cut and seemingly innocent clerk, John Mack, closed the door behind them and told her to lie down. When she refused, he snatched a hammer and smashed her skull with five blows, any one of which, doctors later reported, might have killed her. Mack then grabbed a steak knife, plunged it into her chest five times, and slit her throat repeatedly. After leaving Small for dead in her car, Mack went to the movies.

Mack was sentenced to fifteen years in the Virginia State Penitentiary; but he served less than twenty-seven months in the more commodious Fairfax County Jail. The brevity and leniency of the incarceration was due in part to Mack's previously clean record and in part to the intercession of Congressman Jim Wright, whose son-in-law was Mack's brother. Even before Mack's sentencing, Wright had offered him a job on Capitol Hill. Following his release, Mack rose to become top aide of then-Speaker of the House Wright, serving as executive director of the Steering and Policy Committee—perhaps the most powerful staff position in the House, with a salary equal to that of congressmen and federal district judges.

Miraculously, Pamela Small recovered; as many readers know, she recently agreed to be interviewed by the *Washington Post* for

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an extensive article that coincided with the ethics investigation of Speaker Wright. The public reacted to this whole affair, understandably, with outrage. And its outrage was inexplicable except in terms of retribution, bespeaking the belief that neither his punishment nor his present position had given Mack what he deserved. No doubt the judicial system was correct in saying that Mack had been "rehabilitated"—though he never expressed remorse to Small or offered her restitution. Indeed, by the criterion of rehabilitation he could probably have been released much sooner; perhaps he could have served no time at all. Nobody doubted that he was now a hardworking, talented, and trusted aide on Capitol Hill. Nor was the outrage explicable in terms of deterrence. In the extensive commentary following the exposé, one searches in vain for the contention that the lenient sentence given to Mack would make brutal attacks more likely.

Mack himself and his allies on Capitol Hill spoke of his act and sentence in terms appropriate to mere "penalties"; the very inadequacy of that vocabulary only swelled the public's outrage. At his sentencing hearing, Mack told the judge that "I just blew my cool for a second." A year after the attack, Mack explained to a court-appointed psychiatrist that he had "reacted in a way in which any man would perhaps react under similar circumstances." Mack suggested that he had made a "mistake," and that perhaps he should have been penalized for it to help discourage others (though he did not admit quite this much); nevertheless, it was a mistake that any normal human being could have made. He still characterized his crime in this way sixteen years later; he made virtually the same statement to the *Post* reporter and in his resignation statement a week later in the face of the public outcry: "When I was nineteen, I made a terrible, tragic mistake." Speaker Wright explained his hiring and promotion of Mack along similar lines: "I have never regretted giving John an opportunity all these years. I don't suppose anybody is immune from mistakes."

The disproportion between the deed and its punishment, and between the deed and its characterization, were rendered all the more vivid by Mack's position on Capitol Hill. For Douglass's oration on Lincoln, Capitol Hill provided a perfect setting: "We are here in the place where the ablest and best men of the country are sent to devise the policy, enact the laws, and shape the destiny of the Republic; we are here, with the stately pillars and majestic dome of the Capitol of the nation looking down upon us." It was

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the right place to praise Lincoln, and a mark of their own honor that Douglass and the freedmen stood there. Though Capitol Hill seldom inspires such comments today, the expectation remains that its highest positions should go to men and women of honor. John Mack did not fit his office, just as his punishment did not fit his crime.

Willie Horton and contemporary liberalism

Many who were adamant in calling for John Mack's resignation and in denouncing the injustice of his lenient sentence and his rapid rise to power on Capitol Hill were no doubt among those who saw only "racism" in the Willie Horton story. This centerpiece of the 1988 presidential campaign featured the Massachusetts policy, supported by Governor Michael Dukakis, of giving furloughs to convicts—including those who, like Willie Horton, were serving life sentences for murder and were ineligible for parole. While on furlough, Horton, who is black, raped a woman and tortured her husband, both white. I do not know what role racism may have played in the minds of the strategists who decided to make Willie Horton a campaign issue, or whether racism helped make him a forceful symbol. But I think it a mistake of the first magnitude to underestimate the effectiveness of the ad's surface message: that contemporary liberals, though they may be horrified by "systemic" injustices, do not take personal crime and punishment seriously enough.

Indeed if contemporary liberal theorists, such as John Rawls in *A Theory of Justice*, articulate the self-understanding of today's activists, they cannot take crime seriously, for their theory prevents them from either praising or punishing. Rawls's work, which has gained nearly canonical status among liberal academics, maintains that the basic principles of justice are those that free, equal, and rational actors would adopt in what he calls the "original position." In that position, we abstract ourselves from everything alleged to be morally arbitrary—positions in society, conceptions of the good, the distribution of genetic endowments, psychological propensities, talents and traits—and choose behind a "veil of ignorance" the principles of justice for our society, knowing only that we will have some conception of the good and some combination of these other morally arbitrary features without knowing what they will be. In such a position, according to Rawls, rational actors would be "risk averse"; they would seek to avoid the worst situation

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that might befall them. Accordingly, they would choose two fundamental principles: first, that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and second, that "social and economic inequalities are to be arranged so that they are both a) to the greatest benefit of the least advantaged [the so-called 'difference principle'] and b) attached to offices and positions open to all under conditions of fair equality of opportunity."

Such a theory can account for incentives and disincentives, for penalties and rewards of a sort, but not for praise and punishment. It cannot account for these because the very structure of the original position assumes that virtually all features of human personality that one might praise or condemn—the good that one chooses, one's talents, even one's character—are morally arbitrary.

In the original position you would authorize incentives or "rewards" not because you think an individual might really *deserve* these or higher honors, nor even because you might want them yourself, but because you might end up in the class of the least advantaged; thus you would want incentives leading individuals to develop talents that might bring you benefits that you would not otherwise enjoy. No one really deserves the products of his natural endowments, for "no one deserves his place in the distribution of natural endowments." Nor does one gain credit for the superior character by which he develops those talents, for one does not even deserve his own character: "[One's] character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases."

If Frederick Douglass had studied with John Rawls, he might have restated his praise as follows:

> Fellow citizens: We, the new freedmen, have been and will remain for some time the least advantaged class in America. In affirming principles of justice, others merely hypothesize that they will be in our position; but we are actually in that position and for that reason can speak forthrightly of our interest. We are gathered beneath the nation's Capitol, whose very edifice bespeaks the sentiment that draws us here today. We stand across from Arlington, where that self-same sentiment adorns patriots' graves with fragrant flowers. I speak, of course, neither of gratitude, nor of honor, nor of praise, nobility, and heroism, but of self-interest. Just as taxpayers have erected majestic domes to lure clever men to enact laws for their advantage, just as parents, lovers, and children have set flowers on patriots' graves to get others to die for

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them, so do we, by erecting this monument to Abraham Lincoln, hope to encourage others to bring us things that we cannot get for ourselves.

Favored in the toss of the cosmic dice with useful traits, encouraged to develop these by fortunate social and family circumstances, Lincoln cannot be said in any sense to have deserved his character. But then nobody else deserves it either. So for those benefits that came to us by virtue of those traits that came to him, we wish to give proper recognition. We should not be sentimental about this. Our recognition implies neither gratitude nor approbation. We cannot really be grateful, for Lincoln responded as would any rational actor to the incentive structure in his life. Nor can we express approbation, for whatever one thinks of his character, the notion of desert seems not to apply to his case. Still, so that others so favored in the distribution of useful talents will be encouraged to favor us, and so that other Americans will realize that we are as self-interested as they, we erect this monument.

Rawls is more concerned with denying praise for superior character and noble deeds than he is with denying blame for deficient character and crimes. He styles his theory an "ideal" one that develops and elaborates principles of justice under conditions of "strict compliance"; only secondarily is he concerned with violations of these principles. Nevertheless, his account of "noncompliance" is revealing. "Penalties," he tells us, are necessary in this theory to enable social cooperation and to deal with the "free rider" problem: if you cannot safely assume that others will abide by the social contract or by other implicit and explicit agreements, your own fidelity might set you at a disadvantage. Thus, to give effect to the principles you would choose in the original position and later agreements, you would affirm the use of sanctions against those who fail to abide by their agreements. But as Rawls emphasizes, this criminal sanction is not "primarily retributive"; instead it is a scheme of "penalties that stabilize a scheme of cooperation." Without these disincentives, any normal fellow whom you might meet behind the veil of ignorance (even if he did not "blow his cool" for a second) might rationally choose to break the law for his own advantage.

In this vision of today's liberal activists, atrocity as well as nobility of character and deed both emerge from things "arbitrary from a moral point of view." The voice behind this vision is reassuring and generous. It tells you that nobody—regardless of talent, character, or beauty of mind and soul—is more deserving than you. And generosity undoubtedly draws many to it. But *sotto voce* we hear the more revealing words: nobody deserves anything. The hero will get his pension, but no praise; the villain will get his

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penalty, but no punishment; both will get what they are "entitled" to and neither will get what he deserves, for "the notion of desert seems not to apply to these cases." Whether you are to become a hero or a villain is shrouded by the veil of ignorance. This casual blurring of heroes and villains, this utter denial of responsibility for the characters we become, recalls a comment by Nietzsche:

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible."

In praise of punishment

Why still punish? In part, because punishment *is* terrible, or more precisely, because it is awful. Punishment and praise should indeed fill us with awe, for through these institutions we pay tribute to the awesome range of human responsibility, from the depths of depravity to the heights of nobility. And they bespeak a deeper sense of awe. Human responsibility makes dignity possible; to accept responsibility is to recognize that our understanding of depravity and nobility is not self-willed, or "arbitrary from a moral point of view." It is not simply the result of human conventions or hypothetical contracts among rational actors; it is more a matter of discovery than one of choice. We do, of course, "choose" our criminal laws and sanctions, our honors and prizes, but we do so with the sense that we choose them because we think them right, not that we think them right because we choose them.

Similarly, we abstain from crime—at least most of us still do—not simply because it is disadvantageous but because it is wrong. Criminal sanctions must express that conviction. They cannot simply say that crime is against your interest; they must also express, reinforce, and sustain the sentiment that crime is wrong. To be sure, ours would be a better world were there no crime, and hence no need for punishment; but given the world as it is, we should give punishment its due, for it reminds us of human responsibility as well as the limits of human choice. Without these, in the words of Lincoln, no nation can long endure.

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Problems and non-problems in the American economy

HERBERT STEIN

EVEN IF WE could agree on the facts, which we cannot, there would be much room for disagreement about what the problems of the American economy actually are. To say that something is a problem is to say something about what is desirable and what is possible, and both points are matters of taste and opinion. So in candor I must say that my view of the problems of the American economy may not be shared by many others.

If you ask any group of politicians, journalists, or business leaders to identify the great problems of the American economy, they will overwhelmingly refer to the "twin deficits"—the budget deficit and the trade deficit. Usually they do not think it necessary to explain why these deficits are problems. The fact that they are called "deficits" seems sufficient. One belief that is commonly thought to be adequate ground for worry is that these conditions cannot go on forever. I have tried to comfort people who suffer from this worry

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by propounding Stein's Law, which is that if something cannot go on forever it will stop. That satisfies only a few.

In my view the emphasis on the twin deficits is a mistake. The budget deficit is a problem—or, at least, it has adverse consequences. But it is best regarded as part of a larger problem, which is that the United States does not wisely allocate its large national income among competing uses. Specifically, we allocate too little to providing for the future and too much to present consumption. The large budget deficit is probably the largest but possibly not the most important aspect of that error. I will return to that subject later in its larger context.

Fears about the trade deficit

But the trade deficit is not a problem, even though it drives a good deal of thinking about policy in this country and also seems greatly to affect the attitude of the rest of the world. For some years people worried that the trade deficit would prevent the United States from achieving a high level of output and employment. There was never any basis for that fear, and events have shown that it was groundless. Worry about the trade deficit now tends to focus on the inflow of capital that is its counterpart. This inflow is seen as proof that foreigners are buying up America and that we are becoming a "banana republic"—a country at the mercy of foreigners.

Of course, we do have a trade deficit because we have an inflow of capital. The savings rate in the United States is relatively low, especially since private saving is offset by the large budget deficit. But we do have attractive investment opportunities. So capital flows here from countries where savings rates are higher relative to their investment opportunities. (See Figure I.) Some of these are poor countries that may not have high savings but have few or even no investment opportunities. This capital inflow sustains the value of the dollar at a level where the terms of trade are such that we have a trade deficit. But this deficit is perfectly natural and mutually beneficial. It lets us have a higher capital stock than we would otherwise have, and our workers are more productive and have higher incomes as a result. Savers in other countries have higher earnings than they would if they could not invest in the U.S. It is as natural that we should import capital from countries that are good at saving as that we should import coffee from countries that are good at producing coffee.

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People sometimes say that they would accept this analysis if foreign capital were really financing additions to the stock of productive assets in the United States. Instead, they say, the capital inflow is financing a budget deficit and a high level of private consumption. They point to the volume of Treasury securities that foreigners purchase and to the amount of consumers' goods that we import. That argument, however, is irrelevant. The kinds of assets that foreigners hold here, and the kinds of goods that we import, make no difference. If the federal government runs a deficit of $160 billion this year, someone will have to buy $160 billion in Treasury securities. If it is all bought by U.S. savers, they have $160 billion less to put into productive capital. If foreigners buy $60 billion of it, the U.S. savers have $60 billion more to put into private capital than they would otherwise have had. The basic fact is that investment in productive capital in the United States will be equal to private savings less the budget deficit plus the inflow of foreign capital.

The larger the inflow of foreign capital, the larger productive investment will be, unless the capital inflow depresses domestic saving or increases the budget deficit. One can argue that if there had been no capital inflow, interest rates in the U.S. would have been higher, and hence Americans would have saved more. Of all the things on which economists disagree, the one on which they disagree most, and with the most important implications, is probably the effect of capital's rate of return on the rate of saving. I tend to think that there is probably no effect, but I would not object much to claims of some small positive correlation. In any case, had interest rates been higher in the absence of the capital inflow, total investment in America would have been lower as a result. Similarly, the form of our imports is irrelevant. If we import consumers' goods, we can devote more of our domestic resources to produce capital goods.

People frequently respond that if the capital inflow continues for long at the present rate, the interest and dividends owed to foreigners will mount up to a large, and presumably frightening, total. But this calculation ignores the fact that if the capital inflow continues for long, the amount of capital in the United States that would not have been here without the inflow will also be very large and this capital will generate the income out of which the payments to foreign investors will be made. (Figures II and III show the flow of investment income to and from the United States.)

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Figure I: U.S. Domestic Saving and Inflow of Capital, 1950-1988 (as percentage of GNP)[a]

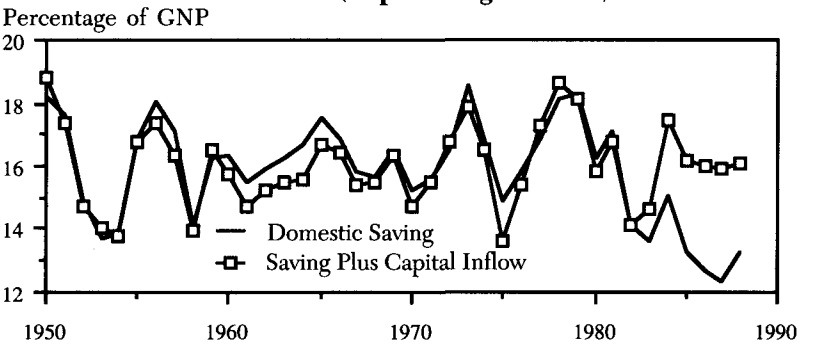


Figure II: Foreign Receipts and Payments (investment income) in Billions of Dollars, 1960-1988[a]

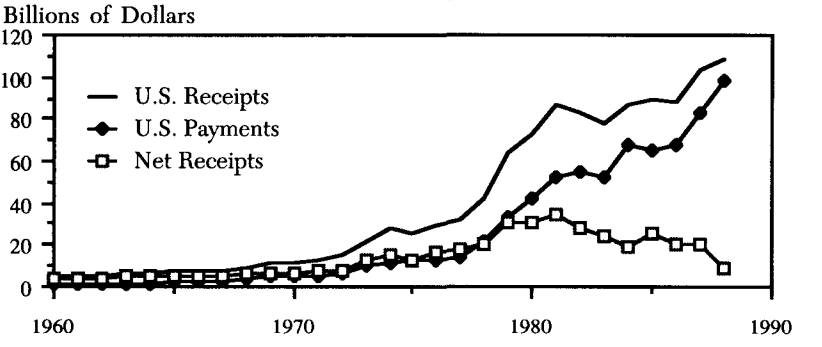
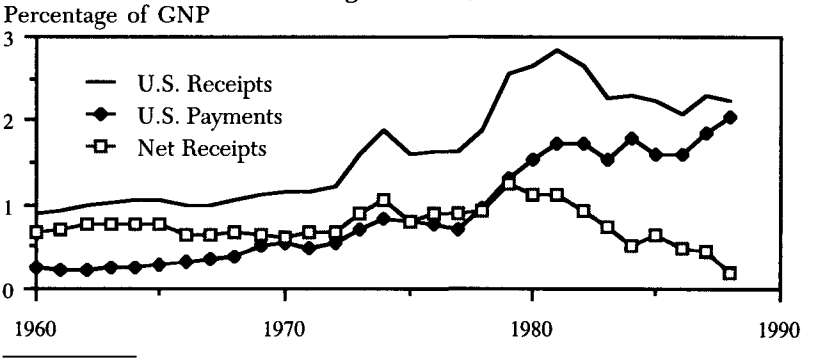


Figure III: Foreign Receipts and Payments (investment income) as a Percentage of GNP, 1960-1988[a]



[a]Source: U.S. Department of Commerce.

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Fears about a trade balance

As it becomes clearer that the U.S. trade deficit and capital inflow are not hurting us, concern shifts increasingly to what will happen when they stop. People visualize the capital inflow coming to an abrupt halt, with a consequent decline in the dollar and rising inflation here, or a rise of interest rates with a recession here, or both. This fear rests on the idea that there is something unnatural and fragile about the inflow of capital, so that it will come to a crashing halt when people see what is really happening. That is a mistake. The capital inflow is a natural and equilibrium response to basic conditions—propensities to save and investment opportunities, here and abroad—that will change only slowly. A sudden change in the capital inflow would be a disturbance—but so would a sudden change in expenditures for new automobiles or for new houses, both of which are larger than the capital inflow. Except for one qualification, there is no special reason to worry about a shock from the capital-inflow side. The qualification is that the attempts of governments to manage exchange rates may cause such uncertainty about the future of the rates that capital flows would be temporarily but seriously disrupted.

If the capital inflow does not increase past its present level, it will become smaller than the amount of foreign currency that Americans need in order to finance their net imports plus the growing amounts of interest and dividends owed to foreigners. The demand of Americans for foreign currency will then cause the dollar to decline. This will reduce our net imports until they, plus the foreign debt service, equal the capital inflow. Although the trade deficit will therefore decline, people worry about that too, saying that Americans will be giving up more domestic goods per unit of foreign goods. But that is a natural consequence of borrowing and investing. If General Motors borrows to build an automobile plant, at some point it has to sell automobiles in order to pay the interest on the debt. Because there will then be more automobiles on the market, the price of each automobile will be lower than if GM had never borrowed the money and built the plant. But that does not make it a bad deal. Presumably, GM thought about that when it made its decision.

Consideration of this whole problem is terribly confused by the universal tendency to think of it as involving transactions between countries. But the United States did not buy more from Japan or Germany than it sold to them, or borrow more from them than it

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loaned to them. Some people who live in the United States engaged in transactions with people who live in other countries. There is no difference between those transactions and the transactions among people who live in the United States. There is no reason to think that these transactions between people in different countries are less well thought out, and less beneficial to the participants and to third parties, than transactions between people in different American states.

Related fears

The trade deficit is a cousin to two other popular "problems" that are also not really problems. One is the "imperial overstretch" problem and the other is the "competitiveness" problem.

The notion that the United States is suffering from imperial overstretch was popularized by Paul Kennedy's book *The Rise and Fall of the Great Powers*, which came out two years ago. The thesis was that excess U.S. spending on national security was weakening the U.S. economy to a degree that would undermine America's world political position and endanger its security. This argument is preposterous when we are spending 6 or 7 percent of the GNP for defense, when the combined economies of the U.S. and our allies are enormously stronger than those of our potential adversaries, and when the gap in our favor is increasing rather than decreasing. Nevertheless the argument was so attractive that it sold several hundred thousand books. This worry seems to be fading. If the imperial-overstretch argument was valid, it applied much more to the Soviets than to us, as recent events have shown. In fact, I would not be surprised if Mr. Gorbachev had read Paul Kennedy's book. But while it lasted the imperial-overstretch argument probably had some effect here—damaging in my opinion—in leading to a substantial cut in U.S. defense expenditures below the level recommended by President Reagan.

The competitiveness anxiety has lasted longer and seems still to be strong. I distinguish between the competitiveness anxiety and the trade-deficit anxiety. I think of the competitiveness anxiety as relating to the comparison of real productivity in the United States and in other countries. This has little to do with trade deficits or surpluses. A country can be very unproductive and still have a trade surplus, if the real exchange rate is low. Taiwan, for example, has much lower productivity per worker than the United States does, but it still has a large trade surplus with us.

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People who worry about U.S. competitiveness believe that productivity in the U.S. has fallen behind that in other countries and that this lag creates real problems for us. Both parts of this proposition are doubtful. The measurement of productivity is difficult. Even to compare productivity in the United States between two years a decade apart is difficult, and a subject of dispute, because the compositions of the outputs and inputs in the two years are so different. The difficulty is much greater in trying to compare productivity in countries as different as, for example, the United States and Japan. But according to the best estimates available, output per head is much higher in the United States than elsewhere in the world except for Canada (and the oil countries when the price of oil is high). Output per head is probably one-third higher than in Japan or Germany.

Still, productivity is rising more rapidly in some other countries—Japan and Korea, for example—than here. That worries people. If these trends are extrapolated far enough, per capita output and income will be higher in some other countries than here. Even aside from the unreliability of such extrapolations, however, I do not find this prospect worrying. Every country cannot have the highest per capita income. There is no law of nature or economics that says that the United States must have the highest per capita income, and the welfare of the American people does not depend upon our having it. This ignores national-security considerations—but these considerations relate to the economic strength of the group of countries that share security interests with us, and not to the United States alone.

I recognize that there is a certain envy or pride or Olympic gold-medal factor involved. But I do not find this factor excited by measures of aggregate per capita income. To the extent that I am envious, it is the income of economists in Tokyo that would affect me, and even more the income of an American economist in the office next to mine. As many people have observed, it is the success of one's friends that is really galling.

There is, however, a kernel of relevance in the concern about competitiveness. The question is not whether someone is getting ahead of us, but whether the performance of others has any lessons for us about the effective use of our own resources. These lessons would be important, not to keep us ahead of other countries but better to satisfy the legitimate interests of the American people. We have been used to thinking that our way of doing things,

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whatever that encompassed in private and public behavior, was best—that it yielded the most output. We believed that the record supported that view. Now, as we look around and see people in other countries excelling in fields we used to think were ours, we have to ask some questions. We see people in other countries seeming to save more, to work longer and harder, to educate their children better, and to manage their businesses better. The evidence for all this is anecdotal. We have to ask whether it is really so, and if so, why.

If it were true, we would also have to ask whether it matters. It would not necessarily mean that something is wrong here. Perhaps our low level of saving and of effort and attention in production and in education, at least of the more "practical" sort, reflect the true preferences of the population. Who could say that the American people were wrong? Income, at least as conventionally measured, is not everything, and we already have a lot of it, in the aggregate and on the average. Nonetheless, something may be wrong here. We may be indulging in kinds of private behavior and public policy that we would not indulge in if we understood their consequences better. If the competitiveness anxiety should direct national concern to such questions, that would be all to the good—even though the true concern would have nothing to do with international competitiveness or rivalry.

A somewhat related view of America's economic problem may be called the Reaganite view. This is the idea that America is suffering from an excess of government spending, taxation, and regulation, which causes economic inefficiency and stagnation as well as a low level of psychic satisfaction and energy. In the opinions of some this is the explanation for what seems the inferior economic performance of the United States as compared with some other countries in recent years.

Undoubtedly there is a nugget of truth here, but in my opinion its chief advocates enormously exaggerate its power. Some government expenditures are wasteful, some taxes unnecessarily distort incentives, and some regulations undoubtedly cause inefficiency. To correct these conditions is an effort that needs to be continued. But there is nothing to suggest that changes in this realm will have great economic effects in the aggregate. And the idea that the difference between the United States (on the one hand) and Japan, Korea, Taiwan, and Singapore (on the other) is mainly due to differences in taxation can only be described as monomaniacal.

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So far I have not mentioned what is probably the most common view of America's economic problems. That is the view that we do not have any serious problems that are strictly economic. In a recent poll people were asked what they thought was the most important problem facing the country today. Three heavily economic answers—the economy, unemployment, and inflation—got a total of 13 percent of the votes. Eight years ago these three got a total of 66 percent of the votes. True, in the recent poll, 17 percent voted for the deficit as the main problem. But when the respondents were asked to choose which was the most important of five listed problems, the deficit came in second, well behind drugs. In another recent poll, drug abuse, crime, and the spread of AIDS all ranked ahead of the first economic problem, which was inflation.

One can dismiss these poll results as reflecting only the ignorance and apathy of a populace that is temporarily lulled by the fact that unemployment and inflation are, for the moment, lower than during almost all of this decade. But I think it would be a mistake to dismiss these popular judgments. In my opinion the people are half right. They have a good perception of what the problems are. They do not understand, and perhaps do not want to understand, the policy implications of their identification of the problems.

Our real economic problems

In my view, America has two main economic problems, one old and well-understood and one whose nature and importance we are just beginning to appreciate.

The old problem is instability—the problem of inflation and unemployment. The United States did pretty well in this regard from the end of 1982 to the end of 1988. Unemployment fell steadily, to the lowest rate we had seen in about fifteen years; inflation remained low by comparison with the late 1970s.

Concern with the instability problem is rising again, but its direction seems to fluctuate from day to day with the latest economic statistic. Earlier in the year there were signs that the inflation rate, which had been around 4 percent in 1987 and 1988, had risen to around 5 percent, and there were those who saw it rising further. At the same time the rise of output and employment had slowed down. Many economists—a clear majority in some polls—expected a recession to start sometime in 1989 or 1990. The dreary word

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"stagflation" was heard again in the land. Statistics that came out in August caused some revision of expectations. There was a tendency to defer the date of the expected recession, although many continued to expect it before the end of 1990. The fear of inflation also faded somewhat. By the time this essay is read, new statistics may well have changed the forecasts again. The most reliable description of present attitudes is that we are at a point of great uncertainty, where a move to recession, toward more inflation, or to both is easily imaginable.

The good record from 1982 to 1988 was due in part to our beginning at the bottom of a serious recession—always a favorable point from which to earn a good record. The record was partly due to a rising dollar and falling oil prices during part of the period. But it was also due in part to a prudent monetary policy that financed the expansion at a reasonably steady rate, which prolonged it but kept it from turning into an unsustainable boom.

We are now in a peculiar position with regard to monetary policy. There is a fairly general agreement that the instability problem is basically a monetary problem. This is not to deny that there are other sources of instability. But it does mean that there are no significant instruments of policy for dealing with instability except monetary policy. (I do hear of some flirtation with the idea of "incomes policy," that old euphemism for wage and price controls, but I can hardly believe it is serious.) Also, there is coming to be agreement that a monetary policy not beyond the wits of man to devise would keep inflation low and would keep fluctuations of output and employment moderate. On the other hand, even those who a few years ago were the most convinced monetarists, and were most sure of the efficacy of constant growth of the money supply, are less confident that they know precisely what monetary policy would yield the best results. The unexpected variations in the velocity of money during the 1980s have been most unsettling to previous notions of the ideal monetary rule.

Experience and analysis may yet discover a reliable rule of monetary policy. For the present, however, we have to operate without it. But we are not completely in the dark. In my opinion, the key lesson of the past two decades is that monetary policy must make the stability of the price level its overriding objective. We do not know how to achieve perfect stability. But if monetary policy keeps its eye on that objective, is prepared to forswear others, and adapts promptly when it has veered significantly from that goal, it

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can avert significant long-term inflation. The errors of monetary policy in the past have mainly been due to subordinating the price-stability goal, or temporizing with it, in the pursuit of other goals, notably stability of interest rates and low unemployment. And in the end, this policy failed to achieve the other goals. On the contrary, our two serious postwar recessions, in 1974-1975 and in 1981-1982, came in the wake of inflations that were allowed to proceed too far.

The United States is now at a critical point in the effort to maintain economic stability. The main decision is up to the Federal Reserve, but it will to some extent reflect thinking and priorities in the rest of the government and in the country generally. There are two options. One is to continue a monetary policy directed to getting the inflation rate down to approximately zero, which the Federal Reserve has said is its objective, even though the rate of real growth has slowed and many are forecasting recession. This does not preclude some adaptation of monetary restraint to changing conditions, but it does imply continuous stress on the anti-inflation objective. The other choice is to relax and turn attention now to sustaining demand and the growth of output and employment and, as one might say, living to fight the anti-inflation fight another day.

I believe that if we make the second choice, and relax anti-inflation efforts now, what has been an inflation rate of 4 percent accepted on the assumption that some day we would start to get it down to zero will become a rate of 5 percent accepted on the same assumption, and then 6 percent.... Someday we will have to devote ourselves to getting the rate down, and the longer we wait, and the higher the rate we start from, the more difficult and costly decreasing it will be.

Heightened inflation is a worrisome prospect, but I am hopeful about avoiding it. There are still people around who remember the inflation traumas of the 1970s and do not want to repeat them. They include, notably, the Chairman of the Federal Reserve. The President has said that he shares the preference of all preceding presidents for low interest rates, which means that, like them, he does not distinguish between low nominal rates and low real rates, or between the short run and the long. But he also should have been somewhat educated by the experience of the 1970s, even though his memory of that episode may be less vivid than that of the Chairman.

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In any case, I do not think that our big problem is in this area of instability, of inflation and recession. Our big problem is something different, and it is this: there are serious deficiencies in America's achievement of important national objectives, deficiencies that one would not expect in so rich a country. (America's GNP has just passed $5 trillion, which even in 1989 dollars is a lot of money.) What the deficiencies mean, in my opinion, is that our enormous national output is not being allocated wisely among its possible competing uses. I interpret the public-opinion polls as reflecting an awareness of this fact. The public is not saying that the country is not rich enough; it is saying that even though we are very rich we have too much crime, too much homelessness, too much illiteracy and ignorance, and so on. And I believe that people are just coming to grasp vaguely the idea that the deficit is part of the same problem, which is the misallocation of the national output.

America's skewed priorities

The United States is a rich country mainly because of what was done in the past. Previous generations of Americans saved and built up a large stock of productive capital here, in which the latest technology was incorporated. Each generation educated its children to become part of an increasingly skilled and adaptable labor force. The resulting economic growth steadily and more or less automatically reduced the proportion of the population living in poverty. But the government took measures to supplement this automatic process and to reduce poverty and economic insecurity even more. We became a welfare state. And when necessary, these earlier generations made great sacrifices to preserve our national security and freedom.

Our performance today looks quite different. Our savings are low in relation to our national income. This is partly because the rate of private saving is low and partly because the government deficit is large. As a consequence the growth rate of Americans' private investment is very low. We have been fortunate that the rest of the world has been willing to supply capital to us. Capital owned by foreigners is better than no capital, but from the standpoint of the future incomes of Americans, capital owned by Americans is best. The true significance of the budget deficit is that it has substantially reduced the rate of private investment owned by Americans.

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Our future wealth is in question. The educational attainment of our younger generations is most optimistically described as "stagnant" and most realistically described as "abysmal." The proportion of the population in poverty has essentially stopped declining. Most ominous for the future, poverty is now heavily concentrated among children.

The condition of the national defense is more difficult to describe. I am not qualified to say how much security or insecurity we are buying with our present defense program. But our present situation is surely unsatisfactory. We maintain a posture of great skepticism about the intentions and capabilities of the Soviet Union. We are very cautious about entering into negotiations for mutual arms reduction. But at the same time we have been making large unilateral reductions in our defense program—not because we have discovered that the program failed to increase our security, but because we have felt constrained by the costs. Our defense program is now at least 12 percent below the program that President Reagan proposed four years ago. President Bush, Defense Secretary Cheney, and Admiral Crowe (former Chairman of the Joint Chiefs of Staff) have all said that they would like to spend more for defense but are limited by economic and budgetary constraints. Such constraints should of course be considered. But to think that they seriously limit a defense budget that takes only 6 percent of the GNP is not realistic.

I am not suggesting that more money, or more allocation of the GNP by government, would by itself solve our defense, education, poverty, or savings problems. Having been a member of the Packard Commission, I realize that with more intelligence, better management, and higher integrity we could get more defense out of the resources that we now devote to defense. I am aware of numerous demonstrations that with determination and love on the part of parents, teachers, school administrators, and students, high-quality education can be provided for less money than we are now spending. Much of the solution to the poverty problem lies in the hands of the poor and of those who influence their attitudes and behavior. If private saving were higher the absorption of much of it by government deficits would be less of a problem.

The inadequacy in our priority decisions—erroneous government decisions about the allocation of the national output—is not our only problem. There are also erroneous private decisions about the allocation of the national output. And there are erroneous pri-

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vate and public decisions about the allocation of other national resources—intelligence, determination, and concern for others.

I emphasize the allocation of the national output as influenced by the government for three reasons. First, I do not know how to affect the other ingredients of decisionmaking, such as private will, foresight, and love for others. Second, I believe that greater allocation of the national output to the purposes that seem to me neglected would help—even if it would not do everything, and even if the devotion of other resources would also help or even help more. But that is not the point that most concerns me. If someone were to say that spending more for education would make the results worse rather than better, I would regard that as a legitimate subject for investigation and would accept the results of such an investigation. The third point is the critical one, in my opinion. It is that our failure to devote more of the national output to defense, to education, to care for the poor, or to provision for the future is not due to any reasoned argument that the devotion of more resources would not help, or even that it would not be worthwhile. It is due to an unexamined argument that we cannot afford to devote the resources. The real limit on expenditures for these purposes is ignorance and arbitrary rules adopted for political convenience.

That is the basic problem. I am not only saying that I would prefer to see more of the national output go for investment, education, care of the very poor, and defense—with less going for consumption (including the currently large expenditures on medical care) by people who are not poor. If the present allocation of the national output were the result of knowing and well-informed private and public choices, I would disagree with the outcome but I would respect it. That, however, is not the case. The present allocation of the national output is heavily influenced by governmental decisions that ignore the facts and the real issues. Decisions about the size of the deficit profoundly affect the share of the national output going to investment. But the deficit decisions do not consider that effect. They are only exercises in "window dressing" the figures to seem to comply with rules arbitrarily laid down several years ago. The share of the national output devoted to consumption is greatly affected by the level of taxation. But in considering whether to raise taxes we do not seriously discuss that or the other real effects of taxation. The discussion is preempted by the question whether it is good or bad to embarrass a president who made a firm commitment during the election campaign not to

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raise taxes. I could give many other examples of the failure to appreciate and act upon the real consequences of important decisions.

The American people, through their government, are influencing the allocation of a $5-trillion national income among its possible uses. This allocation will profoundly affect the quality of life in America, as well as our national security, for generations to come. But it is not too strong to say that we do not know what we are doing—or if we know, that we do not care.

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The downtown job puzzle

BERNARD J. FRIEDEN

THE SUCCESS of the campaign to rebuild American downtowns has confounded those experts who repeatedly proclaimed the death of city centers after World War II. As recently as the early 1970s many old downtowns still looked like newsreels of the Great Depression; businessmen, public officials, and academics all agreed that downtown was finished, and the central city close to collapse. But not long afterward, the noise of jackhammers and pile drivers drowned out the chorus of gloom.

The first hints of a turnaround came during the 1960s, when new office complexes broke ground in one city after another. Since 1960, the thirty largest cities have added as much downtown office space—more than 1300 new office buildings with space equivalent to 250 Empire State Buildings—as they had accumulated in all the preceding years. With a steady 20-percent share of the total new office construction, the city centers built a se-

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Research for this article was part of a larger study reported in Bernard J. Frieden and Lynne B. Sagalyn's Downtown, Inc.: How America Rebuilds Cities *(M.I.T. Press, 1989), which contains full documentation.*

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cure economic base. The comeback was not universal, but few cities were totally untouched: even alleged basket cases like Newark and Detroit doubled their downtown office space in the 1970s.

The downtown construction boom generated hotels as well as office buildings. By offering subsidies, city governments persuaded a few hotel developers to build downtown rather than in the suburbs. The success of these early ventures soon persuaded large hotel chains to build downtown even without subsidies. From 1960 through the early 1980s, the thirty-eight largest urban areas added more than three hundred downtown hotels with 110,000 rooms. In addition to providing lodgings for visitors, many of the new hotels built flashy atriums and dazzling public spaces that enhanced the glitter of downtown.

The cities also promoted downtown shopping malls, with more than a hundred opening after 1970. Three out of four had some public financing, with the median public share amounting to nearly 30 percent of total development cost. Some resembled suburban malls, but most were distinctively urban, like the specialty centers patterned on Boston's Faneuil Hall Marketplace or the mixed-use centers (which combine retailing with offices, hotels, or other enterprises) such as Chicago's Water Tower Place. They are highly popular; some draw fifteen million people a year, as many visitors as Britain.

Likewise, more than a hundred cities have built convention centers in the past twenty years. In 1970 only fifteen cities could have handled a trade show for 20,000 people, but today some 150 are equipped for it. Trade shows and conventions now generate some $20 billion in annual local spending.

At the same time, people with high incomes rediscovered the appeal of urban living. Starting in the 1970s, interesting old houses in long-neglected parts of cities attracted much attention. As Victorian architecture came back into fashion, young professionals were soon cruising the littered streets in BMWs and pounding the broken pavements with Gucci shoes, searching for brownstones to buy. Although this revival is limited to selected neighborhoods with the right combination of charm and access, it has brought a new group of affluent residents within reach of the city assessor; their proximity to the city center also supports downtown shops, theaters, and restaurants, while benefiting downtown businesses that recruit executives who want to walk to work. To round out the rebuilding

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of downtown, cities have also promoted museum expansions and the construction of theaters and stadiums.

The manufacturing districts of the 1950s, the busy harborside warehouses, the freight terminals, some of the once-thriving department stores and specialty shops, and most working-class neighborhoods are no more. Gone, too, are the rubble fields of the 1960s, when the wrecking crews had cleared land for urban renewal, but the builders were nowhere in sight. The new centers feature a cluster of office towers mixed with new hotels and civic buildings, freeways pumping heavy traffic to the edge of downtown, modern housing complexes, one or more shopping malls, some renovated office buildings and warehouses, many new restaurants, and at least one restored Victorian neighborhood.

The logic of an office economy

The new office-based economy has drastically altered the work place. Far fewer workers have production jobs, and many more are in service, professional, or government occupations. In metropolitan Cleveland, two of every three workers in the 1940s had manufacturing jobs, but only one of three today. In industrial Pittsburgh, where the last blast furnace closed in 1980, manufacturing jobs have dropped from half the area's total to less than one-fifth, while downtown now has the nation's third-largest concentration of *Fortune*-500 corporate headquarters. Cities like Philadelphia, Boston, and New York, which used to rumble with industry, are now silent office canyons as well.

The cities' cultivation of an office economy did not do enough to reduce poverty and unemployment for their residents. Most large northeastern and midwestern cities lost manufacturing jobs faster than they gained white-collar ones. In 1979 the central cities continued to have higher unemployment rates than the rest of the nation; as of 1979 they were worse off relative to the suburbs than they had been in 1970. The median family income for city dwellers fell by 4 percent in constant dollars from 1969 to 1978, whereas it rose by 5 percent for suburbanites. The number of poor people remained unchanged in the central cities but went down in the rest of the country.

Even in cities where the building boom was strongest, resident unemployment and poverty grew worse after 1970. The ten cities that led the nation in downtown office development from 1950 through 1984 all had higher unemployment in 1982 than in 1970.

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Nine of them also had higher proportions of people with poverty-level incomes in 1979 than in 1969. From 1979 through 1985 the poverty population in the nation's central cities grew from 16 percent to 19 percent of the total. In New York and Chicago, the leaders in office construction, one person in four lived in poverty in 1985.

Researchers who make comparisons among cities usually use a composite index to rate economic well-being. One index—based on unemployment, the proportion of people in poverty, and changes in real income between 1970 and 1980—shows that Atlanta, Baltimore, New York, and Philadelphia (all among the heavy hitters in downtown development) joined the ten worst-off cities in the country by 1980.

Indicting city hall

With new downtowns rising while low incomes and unemployment continue for city residents, it is easy to blame city hall for promoting the wrong kind of development. Academic researchers, slow to discover the extent of downtown development and grudging in their recognition of any merit in it, see little social value in the growth of corporate headquarters and business services. Joining a national critique of the service economy, they accuse cities of selling out their low-income residents in order to cater to corporate managers, the well-educated, and the tourist trade. Journalists have argued, for instance, that Baltimore's widely acclaimed Inner Harbor development simply "graft[ed] on an array of cute shops to a troubled factory town"; they dismiss the results as "gold fillings in a mouthful of decay." Desmond Smith, writing about the information-based economy of New York, claims that it chiefly leads to

> the rise of a super-rich mercantile class at the expense of the disadvantaged. New York, after a hundred or so years as the melting pot, has entered the age of the Uncommon Man. The common man has virtually no future in the brave new city. White-collar, high-technology jobs are no help to the unskilled poor.

At issue here is the nature of the urban problem. While the press once defined it as the decline of downtown and the flight of the middle class to the suburbs, the most severe critics of downtown development are now writers who see poverty as the essential problem. They believe that city governments have betrayed the commitments they made in the 1960s to end poverty and racism.

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But their critique is persuasive only in part. To begin with, cities are dependent upon the national economy, and they are not responsible for changing its base from manufacturing to services. Nor have city governments created the racism that has denied minorities equal access to job training, business, and the professions.

Furthermore, cities in the postwar era were never able to invest many resources in education, housing, job training, or community services to meet the needs of the poor. They made their commitments in response to strong federal leadership, believing that Washington would foot most of the bill. Federal aid to cities did not actually decrease until midway through the Carter administration, but the handwriting was on the wall by the early 1970s. Both Congress and the White House showed less interest in helping the cities, even though their fiscal problems often grew worse during the post-1973 inflation and recessions. Hard pressed to keep costs down, to raise additional taxes, or to increase bonded debt, cities struggled to stay solvent. Several—including New York, Boston, Cleveland, and Philadelphia—reached the brink of default and bankruptcy. Many more made deep cuts in public services but continued to impose heavy taxes. When President Ford refused to help New York out of its fiscal crisis in 1975, a memorable *Daily News* headline—"Ford to City: Drop Dead"—told mayors across the country what they could expect from Washington.

Faced with rising fiscal strains at home and growing indifference in Washington, city governments could not possibly solve the problem of urban poverty. Instead, the mayors returned to their earlier ambition to rebuild downtown. They attempted to realize this ambition by involving downtown business interests in setting redevelopment priorities, favoring construction projects over public services, and searching for projects that would trigger more development—all initiatives that interested the middle class more than the poor.

Once city governments focused their attention on downtown, promoting office growth was the most practical strategy. Chasing after manufacturing while production jobs were in nationwide decline would have guaranteed failure. Cities that had earlier been unable to compete against their own suburbs for manufacturing could hardly compete against Taiwan and South Korea. An abortive attempt to revive manufacturing in Cleveland is instructive. In the late 1970s the city spent more than $1.2 million to assist an inner-city industrial park that promised jobs for hundreds living in

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nearby public-housing projects. Two new firms—a mattress factory and a bakery—and two existing plants that expanded with city help eventually hired a grand total of eight people from the neighborhood, three of them for short-term openings.

Myths about manufacturing

It is not always clear who works where in modern urban areas, but a few trends are worth noting. Both city populations and downtown jobs are changing, but they are moving in opposite directions. The jobs are increasingly for people who are good at speaking, writing, or managing, or who are expert in law, finance, or computer technology. Yet even as the work becomes more demanding, the best educated and most skilled workers continue to leave the cities, while the number of less educated minorities and immigrants increases. The central city has increasingly become home to people with too little education and experience for high-skill service jobs. As a result, suburbanites hold more than half the professional, technical, and managerial jobs in Boston, Detroit, and San Francisco, and more than one-third in many other big cities.

On the other hand, the new offices also need many people to run the copy machines, answer the phones, and operate the word processors. City workers have better chances of getting into these lower-paying office occupations. Furthermore, the rebuilding of downtown has also brought other kinds of businesses with more jobs for city residents. Hotels, restaurants, and retail stores have greater shares of entry-level jobs and usually employ higher proportions of workers from the city. In Boston, city residents have landed 40 percent of the jobs in newly built retail stores and half the jobs in new hotels. In Baltimore, 40 percent of the permanent jobs at the Harborplace retail center have gone to minority workers.

A close look at workers and jobs in New York City indicates that even if more industrial firms could somehow be enticed downtown, manufacturing would not solve the problems of unskilled city dwellers. The hiring decisions of manufacturers and office managers are surprisingly similar. It is true that 37 percent of the workers in New York's manufacturing firms had less than a high school education in 1980, compared with 14 percent of workers in finance, insurance, real estate, and business and professional services. But it is also true that commuters held 23 percent of all manufacturing jobs, but only 20 percent of office jobs; and at

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every education level their share of jobs was higher in manufacturing than in office and service firms.

New York's growing concentration of office work has actually increased opportunities for people who never finished high school. Between 1970 and 1980 New York lost about 100,000 manufacturing jobs but added about 300,000 office and service jobs. If the education levels of workers in these fields held steady during the decade, then the manufacturing decline eliminated some 37,000 jobs for high school dropouts while office growth during the same years added 42,000 jobs for dropouts. These same changes did much more for college graduates, producing a net increase of about 100,000 jobs for them. At the same time, since office firms were more likely than manufacturers to hire city residents, the change from production to office work gave residents at all education levels an edge over commuters.

Nothing short of massive growth in manufacturing would resolve the employment problems of high school dropouts, and massive manufacturing growth in the heart of the city is simply unrealistic. In New York, where 16 percent of 1980 jobs were in manufacturing, even doubling this share (with corresponding cuts in all other lines of work) would raise the proportion of jobs for dropouts only from 22 to 25 percent.

Further, the allegedly one-sided economy of New York, where two of every three jobs are in the office stronghold of Manhattan, employed as high a proportion of dropouts in 1980 as the national economy. New York's high poverty and unemployment rates in 1980 did not result from an exceptionally small share of jobs for dropouts but from an exceptionally large proportion of dropouts in the population—40 percent, compared with 35 percent in all central cities and 28 percent in all suburbs. Other big cities troubled by economic distress in spite of their downtown revival also lagged behind national education levels, with the proportion of dropouts in Baltimore, Cleveland, Philadelphia, and St. Louis even higher than in New York. Thus the downtown office economy is not the main cause of city unemployment and poverty.

Critics of downtown development fail to recognize how many jobs are still open to people with little education. In an analysis of labor requirements in nine of the largest cities, sociologist John Kasarda classified industries as "entry-level" when their mean employee education level was less than twelve years, and "knowledge-intensive" when their mean education level was more than four-

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teen years. Since every one of these cities has had major downtown office development in recent years, it is not surprising that jobs in entry-level industries declined in seven of the nine between 1970 and 1980. What is surprising is that even in 1980, the nine cities still had three times as many jobs in entry-level industries as in knowledge-intensive ones.

Recent experience in Pittsburgh gives no grounds for hand wringing over the service economy. Between 1977 and 1982 the Pittsburgh area had heavy industrial losses that wiped out close to 15 percent of manufacturing jobs. While production work was in decline, however, professional and personal services were growing almost enough to make up for it, so that overall employment dropped by less than 4 percent.

The decline was concentrated in high-paying manufacturing jobs, while the growth was concentrated in professional-services employment, for which 1977 earnings averaged little more than half as much. If wage levels had remained the same after 1977, the people of Pittsburgh would have taken deep cuts in income. What happened instead is that as the service sector grew larger, its wage levels and working hours also increased. As more Pittsburgh workers moved into service occupations, average earnings overall climbed 6 percent in real dollars from 1977 to 1982. At worst the transformation of the area's economy may have slowed the rate of increase in earnings. There were unquestionably income losses for laid-off production workers, but at the same time enough people were leaving manufacturing voluntarily to create nearly three times as many vacancies as there were layoffs. The record in Pittsburgh as in New York shows that the service economy is troublesome enough to make its critics believable—but not troublesome enough to make them right.

Wage differences in the country at large still favor manufacturing over service jobs, though not for all occupations and not by wide margins. In addition, the advantages of blue-collar work are probably greater than wage differences indicate, since fringe benefits tend to be more generous and employees on hourly wages tend to work more hours per year in manufacturing than in service firms. If cities could capture a greater share of manufacturing, they would be better off in several respects: a broader-based economy would make them less vulnerable to downturns in finance and other cyclical fields; a wider variety of jobs would help residents who have a hard time fitting into offices; and even the marginally

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higher earnings in manufacturing would improve opportunities for low-income workers. Nevertheless, the differences between blue-collar and white-collar work cannot account for the persistence and recent increase of urban poverty. Most critics who fault the job mix in the new downtowns do not back their arguments with data but draw on stereotypes from a golden age of manufacturing that has gone forever.

There are at least three explanations for the failure of strong downtown economies to do more for city residents. One is that low-income people fail to learn about office job openings for which they are qualified or could easily qualify. Without friends or relatives working downtown, they miss the informal contacts that most people use to find work; and company recruiters tend to avoid inner-city neighborhoods. Acting on this theory, a number of cities have tried to change the job-recruitment and training practices of downtown firms.

In addition, many city people lack the education to function well in *either* a factory or an office. Many companies have found that substantial numbers of their city recruits cannot read or do basic arithmetic. A New York bank, for example, tried to recruit tellers without requiring a high school diploma; it found that barely half the applicants were able to pass an examination geared to the eighth-grade level. Similarly, the New York Telephone Company discovered in 1987 that only 16 percent of city applicants could pass its entry-level examinations for jobs ranging from telephone operator to service representative. This situation has prompted both cities and employers to try to improve school performance and student attendance.

Finally, many of the poor in central cities are not in the job market at all. In New York almost four of five women who headed poor families in 1980, and nearly half the men, were neither working nor looking for work. Of those not in the labor force, three-fourths of the women and 60 percent of the men had not worked within the last five years. If the downtown economy expanded enough to create a severe labor shortage, rising wages for ordinary jobs might pull some people off the streets or off welfare. Driving up wages through full employment, however, is probably beyond the power of even the most ambitious mayors, and city officials usually look to the states and the federal government to help the long-term unemployed.

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Is development unfair?

Critics also indict cities for promoting downtown development by taking from the poor to give to the rich. Here their complaints are more justified. City governments in the 1970s acted with unexpected harshness, and nowhere was the turnabout clearer than in New York. Earlier, New York had been especially generous in supporting welfare, housing, and health care for the poor, but it changed its policy after the fiscal crisis of 1975. "The main job of government," declared newly elected Mayor Ed Koch in 1978, "is to create a climate in which private business can expand in the city to provide jobs and profit. It's not the function of government to create jobs on the public payroll." New York cut the municipal work force by 25 percent, laying off police officers, firefighters, teachers, and city-hospital nurses. City officials froze pay levels for public employees and welfare grants for the poor while double-digit inflation devastated family budgets.

But they found money for what they wanted. In the late 1970s, according to one analysis, city outlays that were intended to stimulate private development, such as transportation and utility improvements, increased by 72 percent; redistributive programs to benefit the poor grew by only 20 percent. The projects that moved ahead included a $1.1-billion sewage treatment plant in northern Manhattan, the first section of a $5-billion tunnel to bring drinking water into the city, a new subway tunnel linking Manhattan and Queens, and the $486-million Javits Convention Center.

One of the largest developments of the time was Battery Park City, ninety-two acres of office towers and apartment buildings sited on a landfill in lower Manhattan. An early plan called for subsidizing one-third of the 14,000 apartments for the poor and one-third for middle-income families. But in 1979 a revised plan gave the subsidies to office buildings instead (in the form of tax abatements) and changed the housing into luxury apartments. When Battery Park City opened in 1985, a reporter asked state senate minority leader Manfred Ohrenstein why the project had changed. "What happened was the fiscal crisis," Ohrenstein explained. "Economic reality intruded."

Eager to push development, city government gave tax breaks to all sorts of projects with little regard for their social purpose. A conspicuous example was the glittering Trump Tower on Fifth Avenue, with its million-dollar condominiums and peach-colored marble atrium circled by six levels of some of the most costly retail

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space in the country—subsidized with tax abatements worth $100 million. The city gave $7.2 million in tax abatements for IBM's new headquarters and $42 million for AT&T's, and it kept tax assessments far below market values for choice commercial buildings. Official policy is to assess commercial property at 60 percent of fair market value. The Pan Am Building, however, which sold for $400 million in 1980, carried an assessed value of less than one-fourth that amount; and the Manufacturers Hanover Trust Building was assessed at less than 20 percent of the $161 million that it brought in 1981. When Rockefeller Center offered common stock to the public for the first time in 1985, its management commissioned an independent appraisal that valued the original twelve-acre complex at $1.6 billion; yet the Center's assessed value was only 22 percent of the appraisal figure.

Economist Robert Lekachman summarized the city's response to the fiscal crisis this way: "The deal was that, for the average person and certain minorities, services were going to get a lot worse. Meanwhile, the city became a developer's paradise." Critics attacked the new policies as unfair, while supporters pointed to the benefits of the construction boom in New York and to the net increase of more than 200,000 private-sector jobs in the city from 1977 to 1985.

New York was in step with most other cities. Others that laid off public employees in the late 1970s included Chicago, Cleveland, Detroit, Minneapolis, and Philadelphia. Mayor Coleman Young of Detroit went a step further by inviting citizens to donate trees, benches, and playground equipment to his deficit-ridden city, and to volunteer as recreation workers and even armed police auxiliaries. Researcher Richard Child Hill, writing of Young's "do-it-yourself" government, complained that "since enormous tax subsidies are going to private corporations, voluntary civic enterprise ... amounts to the exploitation of collective concern for private advantage."

Where is the opposition?

If downtown development amounted to "welfare for the rich," as one opponent charged, then outraged victims—especially minorities and the poor—should have been fighting to stop projects while self-interested business and professional groups were mobilizing to build them. Some researchers, indeed, describe the rebuilding of downtown as a class struggle. Yet when Lynne Sagalyn and I

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studied the development of downtown retail centers, we found little outright opposition from any quarter and almost none from low-income or minority groups. The organized opposition usually consisted of well-educated middle-income people critical of a project's size, cost, or design. In San Diego, where the Horton Plaza retail center is a showpiece of downtown development, black and Hispanic residents supported it from the beginning: living far from most suburban malls, they valued the shopping as well as the jobs that Horton Plaza would produce. The opponents were not grassroots radicals but ideological conservatives opposed to city assistance for private business, allied with middle-class preservationists who wanted to change the plan to save more historic buildings. The major opposition to the Town Square retail-office-hotel center in downtown St. Paul came from owners of nearby commercial property. In Boston there was no serious opposition to Faneuil Hall Marketplace, and in Baltimore black voters and the city at large endorsed Harborplace in a bond referendum.

The growing sophistication of city officials in handling the politics of development largely accounts for these facts. Urban renewal and highway construction had left a legacy of fierce local resistance to redevelopment. City officials responded by locating projects on small, strategic sites rather than trying to rebuild entire districts. They chose land away from residential neighborhoods, and wherever possible they worked in areas that most people were willing to write off—underused waterfront and warehouse districts or civic eyesores such as porno districts.

Once the threat of neighborhood clearance disappeared, protest movements lost their steam. The unfairness of cutting city services while rewarding developers is a less compelling issue, and it is also more murky: both the public at large and minority groups want more downtown jobs. Even the low-skill, low-pay jobs that critics label dead-end and menial are useful to many people. Hotel and restaurant work helps poor youths get off the streets. Because offices hire a wide variety of employees with different levels of education and experience, low-income groups also have a real stake in the main downtown growth sectors. One of the highest-growth fields—finance and business services—added some 154,000 jobs in New York City between 1977 and 1984; only one-third of these new jobs are in high-status professional, technical, and managerial categories, while half are clerical and one-sixth are blue collar and service.

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Because of this mix of occupations, most groups in the city stand to benefit from expansion of the downtown office economy. When New York's economic recovery got under way in the late 1970s, blacks and other racial minorities increased their job totals even faster than the rest of the city. From 1977 through 1982 their employment was up by 20 percent, with nearly six of every ten new jobs in white-collar fields. Hispanic workers increased their employment by 15 percent during these years, with virtually all the gains in white-collar jobs.

Blacks are about as well represented as other New Yorkers in the leading growth sectors of business and professional services, finance, insurance, and real estate; Hispanics are not far behind. Though both groups fare worse than whites in getting the top office jobs, minorities do benefit from the new downtown economy. Their incomes depend on the prosperity of corporate offices: in New York nearly three times as many blacks work in the corporate-headquarters/corporate-service sectors as in manufacturing. In addition, New York's new downtown economy has improved the city's finances enough to restore services cut in the mid-1970s. Increases in city hiring after 1980 have brought total municipal employment back above its high point of 1974 to a record peak. And as the economy recovered, the city dusted off earlier plans to tap Battery Park City Authority revenues for subsidized housing. In December 1987 Mayor Koch and Governor Mario Cuomo agreed to set aside enough of the Authority's future rental income to pay back a $1-billion bond issue for low- and middle-income apartments in other parts of the city.

Bargaining for downtown jobs

Some city governments, having invested heavily in the new downtowns, tried to use their leverage to help minority residents find jobs. They made early contact with developers to negotiate project plans and the terms of financial aid. Many cities insisted on provisions for hiring minority construction contractors to build downtown projects, and a few bargained over permanent jobs and business opportunities for city residents.

Mayor Coleman Young of Detroit stood out in this respect. Presiding over a mostly black city plagued by problems of industrial decline, Young followed a typical strategy of cutting city services while promoting the growth of the private economy—but he did it with a difference. He and his business allies worked openly to de-

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velop a black professional and managerial class and to encourage black entrepreneurs. Detroit's purchasing department invited minority entrepreneurs to review city needs for products and services. An official preference system gave bidding advantages to small businesses owned by "disadvantaged persons" and to local firms over outside ones. And all companies that bid on city contracts, applied for tax abatements, or took part in city economic development projects had to meet strict affirmative-action hiring standards.

These strategies, and their counterparts in other cities, are reminiscent of the way political machines eighty years ago used city payrolls and contracts to support immigrants. Civil-service laws and competitive-bidding requirements have changed the rules of the game, but development negotiations now open fresh opportunities for cities to influence private business decisions on jobs and contracts. In the case of Baltimore's Harborplace, a coalition of black contractors and religious leaders made an issue of economic benefits during the campaign for a bond issue to finance the project. The development company, eager for voter support in the black community, made a series of public commitments to affirmative action in construction contracts, construction jobs, permanent jobs, and tenant selection. "We had to win a referendum," explained developer James Rouse. "[I]f the black community had not supported Harborplace, it would have been defeated.... That meant we had to talk about ... the employment of black people and ... bringing black businesses into Harborplace."

The Rouse Company set targets of 10 percent of total contract value for minority contractors, 25-percent minority participation in construction jobs, 50-percent minority participation in Harborplace jobs under the control of the Rouse Company, and assistance to minorities in finding jobs with businesses in the project; it also promised a special effort to find and help minority merchants for Harborplace. The company exceeded its targets for minority contractors, construction workers, and permanent jobs, and twenty-two of the original 128 businesses in the project were minority owned. Rouse conceded readily, however, that his good will alone would not have produced these results. Asked whether he thought outside pressure was important in promoting minority economic development, he agreed that "it takes endless, endless, endless pressure." As for whether business is willing to make the commitment without pressure, he had this to say: "I think business may be willing to,

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but I think it won't. Business is busy. It is occupied by all kinds of deadlines and demands and budgets, and all kinds of things that are occupying you enormously in the completion of a task."

The pressure in Baltimore came from an unusual requirement for voter approval of the Harborplace bond issue. But negotiations have produced similar results in other cities. San Diego officials, for instance, used their position as investors in Horton Plaza to get jobs for city residents. Mayor Roger Hedgecock turned to the Private Industry Council of San Diego County, a training and placement organization, to find jobs for low-income and unemployed San Diegans in Horton Plaza and other city-assisted development projects. The Council then served as the main employment office for Horton Plaza. Store openings created nearly a thousand new jobs and the Council filled half of them. Of the people placed by the Council, 70 percent were minority workers and 60 percent came from high-unemployment, low-income neighborhoods targeted for recruitment. Even more impressive were the results in Boston's Copley Place, where the city's negotiations helped net Boston residents 1900 new jobs, of which minorities held nearly 1100.

The next challenge

In most cities, the long-awaited revitalization of downtown has done less for the residents than its supporters had hoped: development alone is not reducing poverty and unemployment. While the new downtowns are not the sellouts that critics describe, neither are they the triumphs of public policy that mayors promised. They are certainly a tribute to city governments and downtown coalitions that have learned to avoid the disasters of urban renewal, managed to come up with new resources to replace dwindling federal aid, and won political support for public-private projects.

Downtown, once a graveyard of grandiose plans, has become a place where developers with good ideas can earn large profits. As developers lined up to take advantage of the turnaround in downtown real estate, revenue-starved cities saw possibilities for squeezing them to pay for public improvements in return for the right to build. By the early 1980s San Francisco and Boston began requiring commercial developers to put money into a trust fund for housing, on the principle that office growth creates a need for additional houses. Other cities press developers to pay for streets, transit systems, parks, or other community facilities. These "link-

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age" requirements come in many forms, some of which raise serious but unresolved issues of fairness and of law. The requirements are most justifiable on downtown projects that government subsidizes. But even in the absence of subsidies, developers who want to build projects in strong markets have been willing to pay an extra price.

With public-private negotiation widely accepted as a way to manage downtown development, most large cities are well equipped to negotiate for resident jobs and job training. Although the real-estate frenzy of the early 1980s is over, downtown profit opportunities remain good enough to give city officials great leverage at the bargaining table. Further, the economic revival of downtown has enabled cities to tax new development fairly, and to make better connections between public schools and downtown employers. The next challenge to the cities is to help their own residents benefit more from the new downtown economy.

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The costs of free information

RICHARD A. GUIDA

THE FREEDOM of Information Act (FOIA) is revered by some, defamed by others, and unknown to most. It strives to make government more open and accountable, a goal that Americans embrace as essential to participatory democracy. The FOIA finds its staunchest supporters among university researchers, historians, and journalists. Newspaper articles prominently announce the source of information obtained under the FOIA, and editorial scorn routinely greets the failure of federal agencies to respond promptly and fully to FOIA requests. Those whom the FOIA benefits—either intellectually or financially—are quick to sing its praises. But the statute has had a number of unintended and perverse effects. Though Congress has taken some steps to address these effects, more remains to be done.

Congress enacted the original FOIA in 1966 as an amendment to the Administrative Procedures Act. Its stated purpose was simple: "To establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language...." The statute did exempt several categories of informa-

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tion, including classified material, business-proprietary material, information whose release would invade personal privacy, and other material whose disclosure would compromise the public interest. It allowed requesters to seek any written or recorded material in the possession of government agencies, but agencies were not obligated to create material to respond to a request. Requesters did not need to state their purposes in asking for the records, nor did they have to be U.S. citizens.

For several years after its enactment, however, the FOIA had little effect. Bureaucratic inertia, coupled with reluctance to open files for public view, resulted in only a trickle of information being provided to those who requested material under the act. As a consequence, Congress strengthened the law in 1974. Over President Ford's veto, it required federal agencies to respond to requests within two to four weeks, and to afford a simple, internal appellate process to assure uniformity of agency decisions. It also permitted federal district courts to intervene when agencies failed to meet their deadlines, and it empowered the courts to review agency decisions to withhold material; government officials found to be withholding information or treating FOIA requests in an "arbitrary or capricious" fashion faced statutory penalties. Finally, the 1974 amendments permitted government agencies to charge requesters only for the effort expended in searching for responsive material and for duplicating what could be released. In fact, agencies were encouraged in most cases to waive all fees.

At the time of the amendments, the House Committee on Government Operations asserted that for the entire federal government, "additional costs that may be required by this legislation should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five fiscal years." Total government costs since then have exceeded these estimates by amounts that would earn harsh criticism were they caused by errors in the executive branch. The FBI estimates that its FOIA costs alone exceeded $55 million between 1974 and 1983; it had three hundred people working full-time to answer FOIA requests. By 1987 federal agencies were receiving a combined total of more than 375,000 FOIA requests annually, and spending almost $60 million a year in order to answer them.

FOIA fees covered only about 5 percent of these costs. In calendar year 1984, for example, the Department of Defense (DOD) and its component activities received a total of 81,179 indi-

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vidual FOIA requests, the vast majority of which sought more than one record, and some of which sought hundreds of records. The Department spent more than $30 million in responding to those requests, but it recovered less than $1 million from requesters.

The bulk of the expense results from something called the "segregability review": each document requested under the FOIA must be reviewed sentence by sentence to determine what material can be released. In the case of DOD documents, much of the material is either classified or protected under statutes governing unclassified military technology. Great care must be taken to ensure that no militarily sensitive information is released. In addition, when technical records are sought, the segregability review must be performed by people with the requisite technical and security training. Such experts are in short supply; handling FOIA requests is an unwelcome distraction from their important tasks.

Indeed, only senior DOD officials have the authority to withhold information under the FOIA. This restriction, though not explicitly required by the statute, is necessary to ensure that the correct decisions are made and that the Department's actions can be defended in the event of court challenge.

Finally, the FOIA enables requesters to bring legal action after the two- or four-week deadlines have passed. Since many requests involve large numbers of documents, including some that must be recalled from departmental archives, the deadlines imposed in the act often cannot be met. If a suit is filed as a consequence of "slow" departmental response, many (though not all) judges give the Department sufficient time to search for and produce responsive releasable material without undue disruption; most courts recognize that despite the contentions of those who demand the production of documents, the FOIA enjoys no special status over other statutes that agencies are obliged to obey or enforce. Even so, however, the Department must invariably defray the plaintiffs' legal costs.

FOIA uses and abuses

Though usually touted as a check on government, the FOIA is used most often by businesses seeking information on competitors. The material sought ranges from data provided by companies bidding on government contracts, to information provided by firms seeking licensing or approval of new products, to personnel data and financial material that companies are legally required to

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report. The effect is particularly pronounced at regulatory agencies, as illustrated by testimony given by Food and Drug Administration officials shortly after the 1974 amendments were enacted:

> Individual citizens were responsible for only eight percent of FDA's FOI requests in 1976 and the press and public interest groups were responsible for only about five percent. Most of the agency's FOI requests—more than 80 percent in 1976—originated from industry or persons working on their behalf.

In 1979 the New York Bar Association issued a report showing that the federal government's increasing regulatory role has encouraged commercial interests to put the FOIA to unexpected uses:

> In enacting the FOIA, Congress intended to open the governmental process to increased public scrutiny. It was not Congress' intent that the FOIA be used as a *carte blanche* for unrestricted access to otherwise nonpublic information submitted by private citizens and businesses. Nevertheless, the trend among government agencies to require an ever-increasing plenitude of reports and information from the private sector has made the federal government's files a virtual treasury of valuable and sensitive information about private citizens and businesses. Increasingly, the FOIA has been used by various parties to unlock this treasury for the purpose of obtaining information that the government has collected from private concerns.

In the early 1980s, the FOIA showed it could be as much a burden as a benefit. Serious errors began to occur in processing FOIA requests, as agencies released corporate trade secrets that they should have withheld. In a notorious 1982 case, the Environmental Protection Agency mistakenly released the formula for a Monsanto Corporation herbicide, causing Monsanto to lose its domination of a $450-million-per-year market. The *Washington Post* story on the case observed that

> the law has been widely exploited by lawyers for clients who use the government data to develop strategies for fighting federal investigations, spying on the competition and discovering how strictly federal regulations are really enforced....

This and similar cases led Congress to amend the FOIA in 1986. Agencies now can charge the full cost of processing commercial enterprises' requests for information of competitive or commercial value. Further, private firms that submit information to the federal government are now required to identify whether the material is considered "business proprietary." When proprietary material is requested under the FOIA, the originator is asked to explain why the material is considered proprietary. The govern-

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ment agency retains the ultimate authority to withhold or release the material, but the originator may challenge release decisions in federal court. Conclusive data are not yet available to establish whether business use of the FOIA has declined, but there has been one unmistakable effect: the care that federal agencies must devote to handling business requests has markedly increased.

Criminals also use the FOIA heavily. Prisoners use the law to seek information from law-enforcement files about who incriminated them; other criminals use it to try to avoid prosecution. In lengthy testimony before Congress in 1981 and 1983, William Webster—then the Director of the FBI—recited numerous examples of the FOIA's perverse effects:

> We received informant information that Organized Crime members in the Detroit area have been instructed to submit FOIA requests in an effort to identify our sources.... [T]o date, thirty-eight members and associates of the Detroit Organized Crime Family have made requests.... [They] have obtained over twelve thousand pages of FBI documents....
>
> From 1975 through 1981, over seventy members or former members of the Weathermen have made FOIA requests of the FBI.... [T]he FBI has released over 60,000 pages of documents concerning the Weather Underground....
>
> FBI agents are investigating allegations of political corruption and gambling in a major metropolitan area. Several of the principals ... are ranking city employees. The central figure ... made a request under FOIA ... [and] claimed to a fellow employee that ... he could determine whether the FBI was investigating the matter.... In this case we furnished the requester some collateral records while advising that all other materials responsive to the request were being withheld on the basis of the exemption designed to protect pending investigations. By asserting the appropriate exemption, however, we confirmed that an investigation was under way. Soon thereafter, subtle changes were made in the operation, including the shift of personnel from the correct department to other duties. The purge successfully removed cooperative employees ... and completely disrupted the FBI's investigation.

The problem extends beyond the FBI. In 1982, for example, the Drug Enforcement Administration (DEA) reported that of four hundred sample investigations involving FOIA requests, all had been hurt and 14 percent had been aborted, significantly compromised, or reduced in scope. The assessment also indicated that criminals originate more than 60 percent of the FOIA requests that the DEA receives.

The FOIA has also been used to acquire technical material and other information of intelligence value. In the 1970s the Central

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Intelligence Agency was the target of a concerted effort to obtain information that would uncover its agents and informants. The seriousness of this threat led Congress to an action that it was extraordinarily loath to take: in 1983 it made the CIA's "operational files" automatically inaccessible to FOIA requests, so that the CIA need not assert specific exemptions to keep the records in these files secret.

Also in 1983, Congress gave the Secretary of Defense specific authority to protect "technical data having a space or military application." Previously, federal agencies could not cite export-control statutes as a basis for withholding sensitive but unclassified technical data, because the FOIA exemption for statutorily protected information required more specificity than the export-control laws provided. Foreign interests accordingly used this loophole to receive technical data that would not have been released had an export license been sought.

While the FOIA's authors may not have foreseen how useful the FOIA would be to criminals and foreign agents, they did expect the news media to use it heavily. Use by the media, however, is uneven; some segments rarely use the FOIA, while others go on extensive fishing expeditions in hopes of catching something.

During one six-month period in 1984, for instance, *Washington Post* reporter Scott Armstrong submitted over a thousand FOIA requests to the Department of Defense. The documents that he sought included drawings of weapons systems, reports by the Inspector General, and the guides used to classify material in all three services. The Army duly accumulated the material and released the unclassified guides; the Air Force accumulated the material but then balked at releasing even the unclassified guides; and the Navy fought the request from the start, claiming that release of such compiled information would harm the national security. (The theory that unclassified information can become classified if compiled in certain ways has been sustained in court.) Only after the Navy alerted the DOD General Counsel did the services take a consolidated position, which was in close accord with the Navy's initial posture. The services' different reactions themselves received some newspaper coverage, illustrating that the news media are opportunistic if nothing else.

Some members of the media have an odd conception of the FOIA's purposes. As part of an "investigatory journalism" effort, a television station sought documents from a federal agency through

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the FOIA. The agency concluded that the information in the documents would interest the general public, and rather than releasing the documents to the television station alone, it arranged for them to be displayed in the reading room of a local public library. Upon hearing of this plan, the reporter who had requested the documents called the agency, irate that her "scoop" would now be available to other newspeople. When the surprised agency representative replied that he understood the purpose of the FOIA to be to inform the public, the reporter announced that the purpose of the FOIA was to help the news media, which, like any other business, "has to sell its product."

The FOIA requests of public-interest groups may be as scattershot as those of the news media. At the Nuclear Regulatory Commission (NRC), for example, a total of almost five hundred FOIA requests were received during the first six months of 1986. Fully eighty-one were from the Government Accountability Project (GAP), an organization that regularly intervenes to oppose nuclear power-plant projects. The GAP also filed sixty-nine of the 104 appeals that the NRC handled in the first six months of 1986. The GAP's requests, moreover, have tended to be longer and more complex than others. One request, for example, involved the release of 114,000 pages and more than 1,700 staff hours of review. In all, nineteen public-interest groups submitted 149 FOIA requests to the NRC during the first half of 1986.

The FOIA is also used extensively by litigants in lawsuits involving the federal government. Lawyers often use the FOIA to supplement the legal discovery process, for three reasons: it is inexpensive, it has tight time deadlines that are enforceable by law, and it may produce material that is not available through discovery. In 1983 the Administrative Conference of the United States reviewed this problem and concluded that changes to the FOIA were essential to protect the government's interests in litigation. But the recommended changes were never enacted.

The FOIA's effects on documentation

Another of the FOIA's drawbacks has received less attention. Government officials now often avoid fully documenting the process used to arrive at a particular policy decision, for fear that much of what they write will be released under the FOIA. While such material is explicitly exempted from the FOIA as "predecisional," judicial interpretation of the exemption has given

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bureaucrats cause for concern. For example, the U.S. District Court for the District of Columbia ruled in a 1985 suit that the factual information that led to a decision cannot be withheld under the FOIA—despite the government's arguments that the way such factual information is selected and presented reveals too much about the decisionmaking process. The effect is undeniable. A recent informal poll of senior executive-branch officials suggests that the FOIA has discouraged many of them from memorializing useful background information or otherwise treating their actions in writing. In the short term, this hesitancy may not significantly detract from the decisionmaking process. But in the long term, it is vital that the factors bearing on decisions be adequately recorded, to ensure that an official's successor fully understands the behind-the-scenes considerations that affected the decision.

Many in the news media predictably reject this view. But they are in no position to gauge its accuracy; journalists enjoy the blanket coverage of the First Amendment, which lets them keep secret every aspect of their work other than that which they choose to release—that is, publish. More to the point, common sense strongly suggests a conclusion diametrically opposite to that of the journalists. As one simple example, consider the plight of an administrator seeking to assess his agency's performance in some area. He naturally wants a candid, objective evaluation. But lest the FOIA be used to embarrass their boss and their agency, his subordinates might instead gloss over any biting findings in their written report, and convey those findings orally (or not at all). This scenario is not far-fetched; government employees are routinely reminded in meetings to be cautious about what they write because of the FOIA, and supervisors regularly order that all draft copies of reports be destroyed when the final document is issued. If the news media were to ask federal executives involved with a potentially controversial project or decision whether the FOIA affects what they and their staffs write down or how they conduct their affairs, the honest majority would in turn ask the reporters: "If someone could inquire into your files and background material, would it change the way you operate—and for better or worse?"

One further question should greet those who laud the FOIA as an essential tool in assuring open and accountable government: Why limit it to the executive branch? Shouldn't congressional offices be equally accountable? One would search the records in vain for an exploration of this question during the congressional hear-

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ings on the original FOIA or its amendments. Equally unfruitful would be an exploration of the news media's coverage of whether the FOIA should be extended to Congress.

Proposed amendments

But despite its flaws, the FOIA is here to stay. It is both futile and wrongheaded to seek its repeal, since the statute does provide a useful and important window enabling the public to peer into federal government processes. Nonetheless, the window could be much better built. The following amendments should be made to the FOIA:

1. Requests for information should be limited to U.S. citizens, and to those who are not in prison or acting on behalf of prisoners.
2. All material from criminal investigations should be exempted from FOIA requests.
3. As suggested by the Administrative Conference of the United States, the FOIA should be changed to prohibit its use in the legal discovery process.
4. Time limits for responding to requests, particularly those seeking many documents or old material, should be substantially increased. The responding agency should be able to establish a schedule for responses which takes into account volume, age, complexity of material, necessary review time, and so on. A request for fifty documents comprising three thousand pages of classified material might face a standard response time of several months, while the current two-week deadline could continue to apply to simple requests.
5. The full cost of administering the FOIA should be borne by the users. Though the news media are now specifically exempted from FOIA fees, this exemption should be abolished. The fees should cover search time, segregability-review time, the effort required to decide whether to release material, and the cost of copying documents and mailing them to the requester.
6. The FOIA should be extended to cover congressional committees and agencies such as the General Accounting Office.

Until these reforms are enacted, the costs of "free" information will continue to counterbalance its benefits.

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Democracy and Original Intent

LINO A. GRAGLIA

***Leonard W. Levy:* Original Intent and the Framers' Constitution.** *Macmillan. 525 pp. $19.95.*

THE BULK of *Original Intent* consists of free-standing, unconnected, and therefore somewhat repetitive summaries of Leonard Levy's earlier work on the historic background of various constitutional provisions and doctrines. These chapters are generally informative and interesting, treating such topics as the origins of judicial review, search and seizure restrictions, and the privilege against self-incrimination. They add little, however, to the stated purpose of the book, which is to demonstrate on historical grounds the alleged fallacies of "a jurisprudence of original intent." Advocates of such a jurisprudence believe that judges should interpret the Constitution to mean what "the Framers"—its authors and, particularly, its ratifiers—intended it to mean. Their belief is controversial among contemporary constitutional scholars because it is inconsistent with and would invalidate nearly all of contemporary constitutional law. That its correctness is nonetheless virtually self-evident helps explain the passion, not to say rage, with which it is denounced in *Original Intent*.

Professor Levy, Chairman of the Graduate Faculty of History at Claremont College and winner of a Pulitzer Prize for a book on the origins of the Fifth Amendment, is obviously well-qualified to increase our understanding of the meaning of the Constitution. Unfortunately, the thesis of *Original Intent* springs less from his professional qualifications than from his politics. As with most American liberals, Levy's skepticism about democracy is matched only by his faith in judges: "The political branches cannot be expected to do the right thing"—apparently on any issue—"because of political considerations from which the [Supreme] Court is comparatively immune." Jefferson, he suggests, suffered from a disease whose chief symptom is "a chronic commitment to major-

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ity rule." According to Levy, not electorally accountable legislatures but the Supreme Court—composed of nine unelected lawyers, who hold office for life—is the proper "voice and conscience of contemporary society," and is charged with "the responsibility of helping regenerate and fulfill [America's] noblest aspirations." This astounding but standard position among contemporary constitutional-law scholars obviously requires a Constitution that is meaningless except as a transfer of policymaking power to judges.

For more than three decades the Court has spuriously invoked the Constitution to enact substantial portions of the liberal political program. Beginning with the *Brown* decision in 1954, the Court has preempted the political process by determining social policy on such matters as abortion, capital punishment, criminal procedure, pornography, prayer in the schools, government aid to religious schools, integration of schools, discrimination on the basis of sex and legitimacy and alienage, and control of street demonstrations and of vagrants. Without exception, the Court's decisions have accorded with the left's policy preferences. The people can consistently reject those policies and their proponents at the polls, but it is exceedingly difficult to reject what the Court declares to be the commands of the Constitution.

The vast majority of constitutional-law scholars agree with the Court's policy choices and support its removal of these issues from popular control. They therefore think it important to justify what the Court has done in the name—though not on the basis—of the Constitution. Given Levy's political views and skepticism about democracy, it is not surprising that he should seek to aid this cause. What is surprising is that his contribution is credulous, confused, and heavy-handed.

Original Intent denies that the intended meaning of constitutional provisions can guide constitutional interpretation, because "[i]n most cases the meaning of the provisions involved in litigation is not clear." The Constitution, Levy repeatedly insists, "is murky at important points," and this murkiness accounts for the Supreme Court's constitutional decisions. "Were it not so," he says, "the real cases would not keep arising." In fact, however, "constitutional" cases keep arising because proponents of policies rejected in the ordinary political process have reason to believe that they may be enacted nonetheless by the courts. Levy's assertion that cases arise because the Constitution is unclear could hardly be more misleading, given that most constitutional litigation purports to be based on the due-process clause ("nor shall any State deprive any person of life, liberty, or property, without due process of law") of the Fourteenth Amendment. That clause's meaning is clear as a matter of both language and history; it simply declares that people are not to be punished except through established legal procedures.

Similarly, despite the Constitution's several provisions recognizing capital punishment, Justices Brennan and Marshall ada-

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mantly insist at every opportunity that capital punishment is unconstitutional. Levy castigates their position as "humanistic activism run amok" and "arrogance beyond belief," but that insight does not lead him to suspect that "constitutional" litigation may have little to do with the alleged murkiness of constitutional provisions. Nor does it cause him to see that giving the Court the task of helping the nation fulfill its noblest aspirations—precisely the justification that Brennan provides for his position on capital punishment—inevitably leads to such activism and arrogance. Although he does not "believe in the Tooth Fairy and the Easter Bunny," Levy does believe that "most scholars and probably all judges believe that the task of judging should be as impersonal and objective as humanly possible." How he can entertain that notion after studying Brennan's position on capital punishment, or indeed after reading almost any Brennan, Blackmun, or Marshall opinion on constitutional law, only he can explain. Does he really think that Brennan and the justices who joined his majority opinion in the *Weber* case—which held that the 1964 Civil Rights Act's prohibition of discrimination "against any individual because of his race" does not apply to discrimination against whites—were being impersonal and objective? Surely it is easier to believe in the Tooth Fairy and the Easter Bunny.

THOSE WHO defend judicial activism on the grounds that the Constitution is unknowable err in at least two respects. First, in almost all actual cases we know enough to answer the question presented—that is, we know that the challenged policy decision made through the political process is *not* disallowed by the Constitution. American legislators, at least as committed as judges to American values, ordinarily have little occasion and are little tempted to disobey the few restraints that the Constitution imposes. Hence historical examples of clearly unconstitutional laws are exceedingly rare. Controversial constitutional decisions, such as those forbidding states to restrict the availability of abortion or to provide for prayer in the public schools, are not controversial because of disagreements over the meaning of constitutional provisions, but only because they are clearly not required by any constitutional provision.

Second, if the original intent and therefore the meaning of a constitutional provision is truly unknowable, we should conclude that the Court may not use the provision to invalidate laws. Levy is certainly correct that the "Constitution contains not one word" about the issues presented in most actual so-called constitutional cases, but it is odd that he should fail to see that this means only that those cases raise no real constitutional question. To say, as he does, that Supreme Court justices "might as well turn to the comic strips" as to the Constitution for practical guidance "on how to decide most of the great cases that involve national policy" is to say

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only that the justices have no constitutional authority to decide such cases, and hence that they have no legitimate basis for overturning the resolution reached in the political process. Like other defenders of judicial activism, Levy argues as if important policy questions must either be decided by the Court or go undecided.

Original Intent is a maze of contradictions, as if written by two authors: Levy the liberal activist and antidemocrat, who wants the Court to enact his noblest aspirations (though his fellow citizens may find them less than noble); and Levy the constitutional scholar, who claims to see certain problems with unconstrained judicial power. Each Levy holds his position with great conviction, but neither reads what the other writes. Thus Levy the constitutional scholar scathingly—and accurately—indicts Chief Justice John Marshall's opinion in *Marbury* v. *Madison*, which established judicial review. This "most glorified and certainly ... most celebrated opinion in American history" is "also one of the most flagrant specimens of judicial activism." The "evasive" opinion "oozed politics and spewed Marshallian misrepresentation," and "failed to face and consider matters that undermined [Marshall's] own position." Marshall "simply twisted and contorted the case to fit his needs. Certainly the Constitution did not dictate the decision." In sum, "to the extent that national judicial review rests on *Marbury*, it rests on rubbish." Levy the liberal activist, however, believes that the Court that established its unique and extraordinary power of judicial review in this manner may nonetheless be trusted to exercise that power objectively and impersonally.

Levy the constitutional scholar severely criticizes the pre-New Deal Court for making the contracts clause (prohibiting any state law "impairing the Obligation of Contracts") a "repository ... of judicially inferred higher-law limitations on legislative power" and invalidating state law on the basis of "judicially implied limitations on legislation adversely affecting property rights." The view that "courts must hold unconstitutional any legislative encroachments on sacred property rights even in the absence of a written constitutional limitation on legislative powers" reflects "a judicial activism running wild" and an "arrogant ... reading [of] prejudices into the 'spirit of the constitution.'" "From its earliest years," Levy concludes, "the Court has behaved irresponsibly, acting without regard to original intent or indifferent to it, except where that intent buttressed the preferred result.... [T]he Justices have freely gone beyond the text into the wild blue heavenly yonder in search of extraconstitutional doctrines that would do the job when the Constitution seemed inadequate to the task."

The views of Levy the liberal activist as to what the Court may properly do under the Ninth Amendment, however, are altogether different. What Levy rejects about the Court's past treatment of the contracts clause and property rights, he approves and recommends with regard to the Ninth Amendment.

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Although Levy claims that "[o]bscurity shrouded the meaning of the Ninth Amendment" (apparently it is even worse than murky), in fact his historical discussion suggests that its meaning is clear. Patrick Henry and other opponents of a strong national government opposed the Constitution on the ground that it lacked a bill of rights, hoping to defeat ratification or bring about a new convention. The Constitution's proponents argued that a bill of rights would be useless in a system of popular government, because the people would be restraining only themselves—an argument that Levy calls "patently absurd," but which in fact raises a central question of constitutionalism. Worse, the Constitution's proponents feared that the enumeration of specific restraints on the national government might be taken to imply that it had otherwise unspecified powers. When Madison switched from opposing to supporting a bill of rights in order to improve the Constitution's chances of ratification, he drafted what became the Ninth Amendment—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—in response to the argument based on negative implication.

Despite this history, Levy asserts that the Ninth Amendment—unlike the contracts clause—may properly be treated as a "repository for natural rights." These include "the right to pursue happiness and the right to equality of treatment before the law," as well as "the right, then important, to hunt and fish, the right to travel, and very likely" rights to sexual privacy. According to Levy, that a particular "judicial interpretation of the Constitution" would have "shocked or surprised" the Framers does not argue against it. The fact that they "did not intend most, if any, of the rights that litigants read into the Ninth and would have found bizarre the notion that the Constitution protects any of these rights is really of no significance," because they would, "after all," have found most of contemporary life "absurd and bizarre." "Sometimes the Framers have to be ignored."

DESPITE HIS emphatic and repeated rejection of the relevance of the Framers' intent, Levy—like every other constitutional scholar—cannot avoid relying on it, albeit only in the most mistaken and fanciful of ways. For example, he argues that "conceivably" the Bill of Rights omitted statements of abstract principles, such as occur in the Declaration of Independence, because Congress "believed them to be implicit in its streamlined version of what became the Ninth Amendment." Given that we know the purpose of the Ninth Amendment and that Levy's version of it—permitting the Supreme Court to define and enforce "natural" and other unspecified rights—would repudiate the scheme of decentralized self-government that is the essence of the Constitution, Levy's speculation is barely conceivable at best. When Levy adds that the "natural rights" he finds in the Ninth Amendment are

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applicable to the states as well as to the federal government, because "the incorporation doctrine, drawn from the Fourteenth Amendment, superseded whatever limitations the Framers of the Bill of Rights had in mind concerning judicial review over state acts," he ignores the historically dubious (to say the least) basis for that doctrine. One can wonder whether Levy is right to claim that "professional historians ... are comparatively disinterested scholars."

At times, Levy argues as if strict literalism were an alternative to interpretation on the basis of intent. Thus at one point he argues that the Framers "probably did not mean to extend the rights protected by the Sixth Amendment to 'all' criminal prosecutions, but the text says 'all' and deserves obedience." Similarly, in his view, "the Ninth Amendment by force of its terms protects unenumerated rights"—which means, he thinks, that the Supreme Court must be authorized to discover and enforce such rights. "The text is what counts," and "the notion that it must be construed according to original intent is itself a prejudice." At other times, however, he recognizes that a text can be "utterly clear" and yet "not mean what it says .... because it was not meant literally." One of his many examples is the use of "all" in the Sixth Amendment, the very example that he used earlier to support the opposite conclusion: "'All' is an absolute that admits no exceptions. Yet, the Framers did not extend the right to trial by jury to misdemeanants; persons accused of petty crimes were tried in a more summary manner than trial by jury." To accept, as Levy does here, that words cannot always be taken literally is to recognize that intent must be dispositive after all, that words are merely symbols used to communicate meaning, and that it is irrational to permit these symbols to frustrate what is known to be a writer's or speaker's intended meaning. It is to recognize, in sum, that the thesis of *Original Intent* is untenable.

TWO LONG concluding chapters specifically address Levy's basic thesis that constitutional interpretation on the basis of original intent "is unrealistic beyond belief." After repeating his argument that original intent is often unknowable, he contends that in any event it is irrelevant. Interpretation on the basis of original intent would result in a "frozen or sclerotic Constitution" that "would lose its character as a document intended to serve for ages to come"; the Framers "cannot speak from their graves to run our lives by settling the constitutional issues of our time." But this argument again treats the Court as the only branch of government. Requiring the Court to abide by original intent would not "be relying on 1789 to provide answers" to current problems; it would be relying on elected representatives rather than on electorally unaccountable Supreme Court justices to provide answers. It is true that the world has changed since the time of the Framers and that

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the law must adapt to change; but that argues for less, not more, judicial interference with the political process. The Supreme Court's creation of new restraints on self-government is not an aid, as Levy seems to think, but an impediment to adapting the law.

Levy is clearly correct that the Supreme Court "behaves in some respects like a superlegislature or a continuous constitutional convention." But he is mistaken in arguing that it "has no alternative"; the Court could refrain from disallowing policy choices that are not clearly forbidden by the Constitution. Nor is it true that "the American people prefer letting the Court adapt the Constitution rather than amending it themselves. Constitutional amendment, except occasionally, is simply an unrealistic and cumbersome if not impossible way of refreshing the Constitution." Because the Constitution places so few restraints on self-government, it rarely needs amending. The oft-recited fact that jet planes have replaced horsecarts does not affect the power of Congress to regulate interstate commerce; Congress can and does adapt the Constitution to change (presumably with the consent of the people), as by expanding the application of the interstate-commerce clause—a policy question that the Court now properly leaves to Congress.

In any event, a Court that can amend the Constitution becomes our ultimate lawmaker—an arrangement much less attractive to most of the American people than to Professor Levy. And even ignoring considerations of democracy, it is far from clear that the Court has been a good lawmaker, that (as Levy and other liberals think) its controversial decisions of the past three decades have "refreshed" the Constitution. The Court's creation of ever more rights for the criminally accused, for example, has exacerbated problems of crime control; its imposition of busing on schools has accelerated the deterioration of school systems and cities; its creation of a constitutional right to abortion has transformed a matter of local concern into an emotional national issue.

Original Intent ends as it begins with a vitriolic attack on Chief Justice William Rehnquist and Robert Bork, the nation's most prominent proponents of the jurisprudence of original intent. The attack illustrates again both Levy's inconsistency and his misunderstanding of the position that he seeks to refute. Rehnquist and Bork, he states, "give the impression that original intent analysis would legitimate their own constitutional views on controversial questions, and they ignore the extent to which original intent would undermine their own positions. Their assumption that the Supreme Court's versions of history are accurate seems naive." The whole point of original-intent analysis, however, is to show that the Constitution has no bearing on most controversial questions of public policy. Rehnquist's and Bork's only relevant constitutional view is that the Constitution should be interpreted to mean what it was intended to mean; this view does not involve taking a

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position on any other issue and therefore cannot undermine any other position.

Indeed, Levy makes several statements apparently in full and strong accord with Rehnquist's and Bork's approach. The Framers "gave us a magnificent constitution. Its words remain the same and mean something. We might be better off if judges were cabined and constrained by those words, rather than deciding on the basis of their own agendas." Similarly, the Court should not give the due-process clause of the Fourteenth Amendment a construction that "turns the text to fungible hash and defies the meaning of words." "Result-oriented jurisprudence, whether liberal or conservative, is a gross abuse of judicial office." These statements simply cannot be reconciled with Levy's claims that the Ninth Amendment authorizes the Court to enforce unenumerated rights and that the Court has no alternative but to act as a superlegislature.

"Original intent analysis is far more preferable," Levy agrees with Rehnquist and Bork, "than the surrealistic visions, moral reasoning and non-interpretivism that abandon the text, its historical origins, its Framers' intent, and the expositions of it in their time." "But it does not follow," he says, "that the 'only way in which the Constitution can constrain judges,' in the words of Judge Robert H. Bork, 'is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and various amendments.'" That certainly does follow, however, and Levy neither tells us why it does not nor suggests any other way in which the Constitution can constrain judges. He insists that "no credit whatever attaches to the assertion"—made by me—"that interpreting the Constitution 'simply means to determine the intent of its Framers....'" He does not claim that this assertion is incorrect; instead he rejects it only because, if credited, it would prevent the Court from "reforming and civilizing state criminal procedures under the Fourteenth Amendment."

INSTEAD OF pointing out the alleged errors of Rehnquist's and Bork's position, Levy responds with invective and accusations of bad faith. Bork's inability to find in the Constitution a right of "sexual privacy" applicable to the states shows that he has the "historical imagination of a toad." Rehnquist's "pernicious" refusal to disallow a state law providing for a moment of silent meditation or prayer in public schools shows not judicial restraint, but that he is "an activist judge on a rampage." Indeed, both Rehnquist and Bork are really "conservative activists who ... would radically change American constitutional law" to further their preferences for "business over government, government over the individual, and the states over the nation":

> The fact is, and it is a fact, that Bork and Rehnquist, like any other originalist judges, are every bit as subjective as Brennan and Marshall. Their manipulation of the rules of construction achieves whatever result

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they seek. What they attribute to the Framers derives from their own moral reasoning.

The facts are precisely the opposite. With very few or no exceptions, Rehnquist and Bork have not used or favored the use of constitutional law to further conservative causes—despite the urgings of some conservative and libertarian scholars. Rehnquist's and Bork's insistence that the Constitution should be interpreted to mean what its Framers intended it to mean would strictly limit judicial subjectivity in the only possible way. Their approach, if adhered to, ensures that policy decisions reached through the ordinary political process can prevail. They attribute to the Framers only the intent to create a decentralized system of self-government through elected representatives; thus they would make not their own moral reasoning, but the moral reasoning of a majority of their fellow citizens, determinative in settling issues of public policy.

Judicial review is consistent with democracy and the rule of law only if judges refrain from disallowing policy choices that are not disallowed by a knowable and meaningful Constitution; the only alternative is centralized and undemocratic rule by the Supreme Court. *Original Intent*, though confused and inconsistent, seems less to dispute this conclusion than to argue that judicial policymaking is a good thing, preferable to policymaking by elected representatives. It is less a work of history than of very bad political science, hardly getting beyond the assertion that judicial policymaking is necessary to keep the country on a high moral plane and the Constitution up to date.

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The Limitations of Structural Analysis

LAWRENCE M. MEAD

Margaret Weir, Ann Shola Orloff, and Theda Skocpol, eds.: **The Politics of Social Policy in the United States.** *Princeton University Press. 465 pp. $14.50.*

SOCIAL-DEMOCRATIC critiques of the American welfare state abound, but they often have more polemic than evidence behind them. *The Politics of Social Policy in the United States* is one of the best works in this genre. It is solidly researched and written with calm authority. The book has important shortcomings, but

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even these are instructive, for they reveal the outer limits of what "structural" analysis can say about American social problems.

Sponsored by the Project on the Federal Social Role (an arm of the National Conference on Social Welfare), the book attempts to explain why the development of a welfare state has been late and incomplete in the United States compared to Western Europe. The authors recognize that the U.S. has extensive social programs, but note that it lacks what they take to be the hallmarks of European collectivism—guaranteed benefits for the working-aged (not just the elderly and the ill), and a "comprehensive active labor market policy" to assure well-paid employment to all workers regardless of economic conditions. The nonelderly poor are assured income support and health care, and sometimes jobs, in several Western European countries, while in the U.S. they usually are not.

Others have explained these differences by referring to the political influence of business and, in general, the conservatism of American society. These authors offer a more subtle analysis. Business did not oppose the welfare state, they say, so much as take over many of its functions. Following a vision of "welfare capitalism," some businessmen in the 1920s offered insurance and pension benefits to their workers. After World War II, private health and pension plans for employees blossomed—with government encouragement—to such an extent that support for greater public provision of such benefits was seriously undermined. Businessmen also accepted Social Security as a useful way to divide the burdens of pensioning workers with government; they questioned the system only in the 1970s when its costs soared.

The left has a tradition of holding white Southerners partly responsible for the backwardness of American social policy, and this book is no exception. The seniority system in Congress gave the representatives of the "Solid South" such control over legislation that reformers of the 1930s and 1960s had to compromise with them. The authors show how this "almost feudal" region shaped the history of specific programs. Agricultural laborers were excluded from coverage when Social Security was set up in 1935, because Southern plantation owners feared that the income would free their black field hands from the need to labor. They preferred supporting the elderly through welfare programs subject to local control. One of these—Food Stamps—also helped buy up their surplus produce. Southern leaders later agreed to include farm workers under Social Security, liberalize its payments, and federalize welfare for the elderly, but only because mechanization had eliminated their need for plentiful black labor.

The authors also say, as others have, that the tendency of the American regime to disperse power made it difficult to form the broad social movement—uniting factory labor, farm workers, and blacks—that might have imposed a fuller socialism on the U.S. The "persistent bifurcations" in the American public-support sys-

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tem—which divide private from public benefits, social insurance from welfare, and mainstream benefits from antipoverty programs—set clienteles against each other, thereby limiting the size and ambition of the American welfare state.

AT THE SAME time, the book argues that social programming was actually set back by early democratization in America. In Europe, society was seen as class-ridden, government as progressive. Regimes early developed the authority to impose change on society because elites of both right and left demanded it. Thus when benefit programs were enacted in the last century, strong public administration already existed to run them. But in the U.S., society was seen as healthy and government as dangerous, so society dominated government rather than the other way around. The masses entered politics early and easily. They saw government as an instrument of patronage, not of reform. Parties vied for power, not to remake society, but to parcel out jobs and other subsidies to their supporters.

As a result, even the social programs that were enacted were not prudently administered. The pensions paid to Civil War veterans mushroomed into the first mass benefit program in U.S. history. Politicians kept expanding the program to the point that, by the turn of the century, it was helping to support at least half of the elderly, native-born men in the North. "Good government" elites remembered the program as a scandal, which was one reason why no national benefit programs were enacted during the Progressive era.

During the 1930s, Social Security and unemployment insurance were established, but in a conservative way. While Depression-era radicals like Huey Long demanded that government simply transfer wealth from the rich to the poor and jobless, the Roosevelt administration insisted that the new benefits have a "sound actuarial basis," with benefits premised on the recipients' own prior contributions. Historically, the strongest social agencies have been those running Social Security and farm programs, not the employment agencies with the greatest potential to intervene in the labor market.

The government did impose important controls on the economy during the Depression and both world wars, but conservative interests in Congress made sure that they did not carry over to normal times. Several of the essays, especially Margaret Weir's, exhume long-forgotten blows to economic planning. When the executive branch was reorganized under Roosevelt, for instance, it gained only limited power to coordinate economic programs. Wartime proposals to perpetuate Depression-era jobs programs were defeated, and the Full Employment Bill of 1945, which called for "full employment guaranteed by government spending," was replaced by the much milder Employment Act of 1946. In the 1960s

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renewed proposals for an activist labor policy to help the poor were rejected in favor of "commercial Keynesianism," which merely managed the economy in the interests of business.

SO FAR as it goes, the argument is compelling. Nevertheless, the authors give a skewed and incomplete picture of the origins of the American welfare state. They present it as the Gulliver of government—large but helpless, incomplete, and less able to intervene in society than comparable European structures. If by "welfare state" one means only programs that provide income, health care, or jobs, this view is valid. But if one includes regulatory endeavors on behalf of the public good, the verdict might be reversed. The federal government has been more vigorous than any European regime in controlling the environment and many sectors of the economy. Regulation has been the American substitute for public ownership.

And in pursuing racial equality, the federal government has been as interventionist as any collectivist could ask. It has imposed voting for blacks on the white South, affirmative-action plans on business, and busing for school desegregation on localities in a manner that brooked little opposition. To these ends, federal agencies and courts have shown exactly the power to defy conservative interests and feelings that the authors think necessary to achieve progressive change. Race is the area where American society has most needed reform, so sovereign power and the will to use it have grown up around race in the U.S., as they have around class issues in Europe.

The book's political analysis is also incomplete. It focuses mostly on the factional maneuvering over particular benefit programs and proposals; the authors say little about the views of the broad public. But America's clear division between social insurance and welfare follows directly from public opinion. The public strongly prefers that benefits be earned; contributory programs such as Social Security and Medicare are seen as respectable, but welfare is not.

Similarly, the authors discuss the views of prewar elites, but not those of the experts who have shaped recent antipoverty policy. Elites in and out of government did much to frame the Great Society initiatives, and it was expert criticism more than conventional partisanship that set the stage for the Reagan cuts in these programs. The authors suggest that the programs were abandoned simply because of weak commitment or troubled implementation. But the decisive factor was that few of them had demonstrated any potential to solve the problems of the poor. If they had, the Reagan cuts would probably never have been proposed, let alone approved by Congress.

The authors miss this point, because they are better historians than policy analysts. The book is almost innocent of the research

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literature that now surrounds all government activities, and especially antipoverty policy. This omission also weakens the book in its main political purpose: to achieve a "better future for social provision in the United States." The authors advocate a wide range of new social benefits, including guaranteed jobs, family income supports, and child care, but they never support their case with the rigor required to get a serious hearing. They simply assume it, based on the experience of European welfare states. These countries, however, are now reassessing their policies. Since the U.S. taxes employers and the affluent relatively lightly, it cannot afford the lavish benefits that the working-aged get in Europe, but for the same reason it has a much more dynamic economy. Government does less for workers, so they face more pressure to accept available jobs and work steadily; but there are also more and better jobs available. That is the classic tradeoff posed by government intervention in the economy.

IT IS ESPECIALLY dubious that expanded entitlements would do much to help the current American poor. The authors suggest that the long-term needy, most of whom are nonwhite, owe their problems to racism or to the inadequacy of government programs. Experts, however, are most puzzled by how little the needy do to help themselves. Work levels among the adult poor have dropped precipitously in the last thirty years. The main cause is not an absence of jobs, or the presence of welfare. It seems rather to be the reluctance of many poor adults to accept available but low-paying jobs, and the defeatism of others about their ability to work. There are still many poor people who work, but they are considerably outnumbered by the nonworking.

Unfortunately, traditional reform strategies, on both sides of the Atlantic, assume that the adult poor are working. When they are not, it is immensely more difficult, both politically and practically, for government to help them. This problem afflicts both conservative free-market strategies and liberal programs: if the poor do not work, they cannot receive work-connected government benefits, but neither are they supported by the private economy.

More than anything else, it was the failure of the welfare-dependent poor to work that defeated proposals to expand welfare in the 1960s and 1970s. The alternative was to offer jobs to dependent adults. The authors suggest that 1930s-style public employment programs have never been revived. But they were, on a sizable scale, in the 1970s under the Comprehensive Employment and Training Act (CETA). It was the failure of CETA trainees to move on to available private jobs, among other problems, that killed the program. Since the authors favor guaranteed income and jobs, they need to address these episodes. Remarkably, they do not.

The authors know that there is little prospect of greater social provision until advocates invent "political metaphors of collective

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compassion simultaneously appealing to blacks and whites, to traditional and newly structured families, and to the middle classes and the poor." That is a tall order. The destitute and the better-off could make common cause during the Depression, when most poor people had either a job or a work history. Today most do not, and as a result those who work regularly see little in common with them. The division between the haves and the have-nots arises from real differences in conduct and competence and not, as the authors suggest, merely from the invidious separation between welfare and mainstream government programs.

Because of this problem, experts and policymakers have moved toward the idea of "workfare," which requires welfare recipients to work or to prepare themselves to work in return for support. Mary Jo Bane's chapter, in fact, advocates this approach. A leading welfare and poverty expert, she makes the kind of concrete, practical argument that carries weight in Washington. Her tone is worlds apart from the broad historical reasoning of most of the other authors. The editors, in their concluding chapter, criticize workfare as "authoritarian" and as exceeding the current capacities of government, which it may well do. Nevertheless, such ideas have more to recommend themselves today than do traditional entitlement programs.

The malign hands of business and the South, however they may have shaped the early American welfare state, do not reach far enough into the present to explain our own time. In the 1960s the power of the Southern congressional barons was broken, and in the 1970s business absorbed political defeats—over social spending and environmental controls—that even Reagan could not reverse. Government has refused to give more to the current poor because few people now believe that doing so would help them, not because no one cares. Polls and politicians both say that the commitment to fighting poverty remains strong. But it does not extend to approaches that have demonstrably failed. Current interest centers on workfare and local efforts to reform public schools and toughen law enforcement in poor neighborhoods.

The principal beneficiaries of traditional reform politics have been needy families whose heads were already working or were willing and able to work, and who therefore needed only jobs or better wages and benefits to get ahead. The political desire to help these people has not diminished, as is shown by the current scramble in Washington to heap new benefits on the "working poor." If the majority of adult poor ever again fell into this category, they might well form a coalition with other low-paid employees for better jobs or new benefits. But first the idle poor must accept the available jobs. That is the nettle that the left has yet to grasp.

William Julius Wilson (who with two students contributes a chapter to the volume) argues that the inner-city poor cannot work

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because deindustrialization and residential segregation have pushed jobs out of their reach. But most of the evidence suggests that at least low-paid jobs are accessible to these workers. Wilson and the editors call for public measures to ensure a "tight labor market," but the supply even of unskilled labor is already tight. It is destined to remain so, because of the falling numbers of young workers entering the labor force. An interventionist employment policy might only make matters worse, as CETA often did, by turning work into welfare.

STRUCTURAL ANALYSTS tend to talk much more of the past than of the present. That is understandable, since it is in the past that clearcut barriers to opportunity are chiefly to be found. In the 1930s jobs really were unavailable on a massive scale, even employed people were commonly poor, and discrimination crippled the life chances of nonwhites. Today, by contrast, decades of economic growth and anti-bias reforms have greatly improved opportunities, but today's poor do not seize them with the avidity of their forebears. No merely structural reform can solve this problem.

Radical social analysts are the true conservatives of our time. They are no longer revolutionaries, but rather heirs to a tradition of progressive reform stretching back two centuries. They claim that heritage as Burke once claimed the medieval constitution of England. They see it, to borrow Wordsworth's words, as a "flood/ Of ... freedom, which, to the open sea/ Of the world's praise, from dark antiquity/ Hath flowed." The flood moved on irresistibly from the political realm (voting rights), to the economic (collective bargaining and minimum wages), to the social (income and health benefits), always broadening the chances of ordinary people. Always, reformers could direct their attention to outward barriers, because the inward competence of the downtrodden to seize opportunity was never in doubt.

Today it is in doubt. The reform tradition remains relevant for the bulk of Americans, but not for the underclass and the homeless, the main objects of today's social-policy innovation. The progressive tide has not ebbed much, but it is no longer advancing. Most of the idle poor are marooned high up the beach, beyond its reach. To rescue them will require a new kind of social policy, one that aims to create competence instead of assuming it. Today, only policies that achieve that end can truly be called radical, for only they address the roots of the problem. A new reform tradition, no doubt more paternalist than the old, is struggling to be born.

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No Calcutta

ROGER STARR

***Peter H. Rossi:* Down and Out in America: The Origins of Homelessness.** *University of Chicago Press. 288 pp. $15.95.*

THE STREET SCENE in too many central sections of too many American cities suggests the existence of a wholly new variation on an ancient problem: homelessness. In prior years, before vagrancy laws were discovered to be unconstitutional, homeless people—usually male and of advanced years—were kept out of sight in a Skid Row section of their city. They are no longer out of sight, and their numbers are now unprecedented. Their aggressive behavior and bizarre appearance—often compounded by mental instability and chemical addictions—frighten and discomfit urban residents, who react by proclaiming their hometowns Calcuttas. These apprehensions are stimulated by organizations, ostensibly concerned with helping the homeless, that enthusiastically condemn America's alleged heartlessness. But America's cities are not yet Calcuttas in which whole families dwell permanently on the pavement.

The key to understanding modern homelessness is that it is not primarily a housing problem. While some people burn with zeal to provide housing for the homeless (usually in a neighborhood where they themselves do not live), such spending would be futile unless we could identify those of the homeless who want to live, and could successfully live, in permanent homes. Such a classification in turn requires answers to the two most troubling questions raised by the specter of Calcutta in America: Who and how many are the homeless? What should be done to help them?

Peter Rossi takes a comprehensive look at both questions, on the whole quite dispassionately, in his new book, which significantly expands on his earlier study *Without Shelter: Homelessness in the 1980s*, which was sponsored by the Twentieth Century Fund. Examining and evaluating the statistical methods of the various researchers who have tried to define homelessness and to estimate its incidence may not sound controversial. Yet Rossi, who has himself supervised just such studies in Chicago, demonstrates how elusive the facts are, and shows why readers should disregard the Coalition for Creative Non-Violence's daunting estimate that two to three million Americans are homeless.

Counting the homeless is quite difficult. The national census counts people by mailing forms to their addresses. It has the most trouble counting residents in areas where tenancy is chancy and turnover swift. By definition the homeless lack an address; their normal pattern of life exacerbates the pattern that gives the Census Bureau its greatest difficulty.

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It is easy enough to say that to be homeless is simply to be without a home. Yet despite the poor quality of municipal shelters, many of their residents have homes elsewhere, often in the very cities in which they choose to sleep in shelters. They use shelters only for a few nights, and return to their homes when family conflicts abate, or when they receive sufficient funds to pay their bills. In all efforts to count the homeless, enumerators must therefore judge, based on first impressions and little more, whether interviewees will go home again.

In addition to the technical problem of avoiding double counting people without addresses, Rossi points out the difficulty of distinguishing homes built to low standards from those that are, or should be, deemed uninhabitable—no matter what the sentiments of their residents. Does a cardboard box leaning against the back of a railroad station become a home because its occupant loves it? At the other extreme, is an eighteen-year-old to be considered homeless because, though living for the most part at home, he would prefer an apartment by himself but cannot afford it? Should an enumerator accept every interviewee's belief that he does or does not need government help to find housing?

Reliance on self-definition can grossly overstate the problem and exaggerate the role that government should play in enlarging the housing supply. Obviously a family living in a small, overcrowded house in East Peapack that really wants to live in a bigger house with a two-car garage in West Teaneck is not, for that reason, to be deemed homeless. Yet sometimes personal feelings translate into behavior that may require public action. Imagine a nineteen-year-old unmarried mother who has been living in a crowded apartment with relatives. Suppose that family tensions become so unpleasant that she takes her welfare allotment and leaves. If she cannot find an affordable apartment, and so ends up in the welfare department's office while it looks for place in a temporary shelter for families, is she homeless? In the real world such questions must be answered by enumerators, not Solomons. The variety in their decisions inevitably makes statistical summaries uncertain.

TO ESTIMATE the number of homeless people in America, Rossi is willing to include all those whom the enumerators find in shelters—even if they are there only temporarily—on the theory that anyone with a home would surely prefer it to a shelter. The more difficult job is estimating the number of homeless people who are not in shelters. Some live in homes like the cardboard box; others sleep in public places; some, even more difficult to count accurately, live illegally in privately owned apartments, doubled up with other families who are the tenants of record.

Rossi develops a sampling method to complete his estimate of the homeless population. He and his colleagues in Chicago iden-

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tified the areas of the city in which there were both shelters for the homeless and a significant number of homeless people sleeping in "unconventional" places other than shelters. They conducted a census of the homeless in several of these districts, establishing a ratio between the number of people in shelters and the number outside of them. Rossi believes that applying the ratio to the easily countable shelter population, area by area, provides a reasonable method for estimating the total homeless population.

It is easy enough to criticize his method. It seems obvious that urban areas differ so greatly from one another that a standard ratio of sheltered to nonsheltered homeless people must be unreliable. Nevertheless, when all the ratios are averaged together to develop a mean relationship, at least we have a sense of the order of magnitude of the homelessness problem. Applying his ratio to the known shelter population of each city, and adjusting the ratios to take account of seasonal and climatic variations (sleeping outdoors in February is more practical in Phoenix than in Boston, and a much larger proportion of Phoenix's homeless people stay out of city shelters in any case), Rossi calculates that the homeless population nationally is actually between 250,000 and 350,000.

UP TO THIS point, it is easy to go along with Rossi's estimates. The remainder of his book—which diagnoses the causes of homelessness and proposes remedies for it—is more problematical, though it is still of great value.

Readers who are familiar with the current street life of American cities should be cheered by one of Rossi's policy suggestions: he advocates, though only as a short-term measure (probably so as not to offend civil libertarians any more than is absolutely necessary), that the "most severely disabled [be moved] from the shelters and the streets into total-care institutions."

While this proposal may strike casual observers as uncontroversial, Rossi finds it necessary to make a deeply apologetic bow to those who continue not to perceive the irony in Anatole France's suggestion that French law equitably permitted both rich and poor to sleep under bridges. While Rossi acknowledges that civil libertarians will oppose committing those with serious mental illnesses to mental hospitals, he points out that the only probable alternative for them is early death.

No one believes that all of the homeless on the streets or in public places are certifiably insane and should be institutionalized; still, many of them should be. Nevertheless, the anti-institutionalists have until very recently asserted that the homeless are exactly like the rest of us except that they have no homes. In their view, in the absence of proof that the seriously disturbed homeless endanger themselves or others, only statists who fail to respect human rights defend their involuntary institutionalization. In this context, Rossi's position—that the clearing of the mental hospitals

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has had unfortunate consequences that arguably exceed its benefits—is courageous.

His courage is more remarkable when one realizes that elsewhere in the book Rossi skirts the issue of the relationship between deinstitutionalization and homelessness:

> Much has been written asserting that deinstitutionalization of the chronically mentally ill during the 1960s and 1970s is a major cause of the recent rise in homelessness. Almost as much has been written denying it. At this time it is almost pointless to try to determine which side in this controversy is correct, largely or in part. The decanting of the mental hospital population occurred throughout the 1960s, so its current effects have in any event long since been diluted by time. What is important right now are the current admission policies of our mental hospitals.

Rossi should have written at this point what appears later in his book. Instead he begs the question, pointing out that even before civil libertarians and state budget authorities combined to convince the courts that state hospitals for the mentally ill were costly, brutal, and unconstitutional, 20 percent of the homeless in shelters were thought to be psychotic. Rossi fails to draw the obvious conclusion: if 20 percent of the people in flophouses in Chicago and New York in the 1950s were mentally ill, how many of them are mentally ill now, when the previous hospital population has been "decanted" and far more restrictive admissions policies have reduced the patient population by more than 60 percent?

By recommending changes in mental-hospital admissions policy, Rossi implicitly concedes that unhospitalized psychotics *are* a significant component of the homeless. These psychotics pose serious health and safety problems, particularly in the central areas of the city where they congregate. An additional problem, impossible to quantify but nevertheless important, is the demoralization of urban residents, who respond with increasing callousness to the people living on the streets and in public buildings. It seems reasonable to assume that an increase in the number of beggars on the street, absent an economic catastrophe to explain it, encourages people to resist the beggars' appeals. Similarly, the constant sight of street people, which at first may provoke pity and interest, ultimately repels neighbors and demands too much of human sympathy. Fear of hardening the heart against the mad may, indeed, have been the historic reason for isolating them; some visitors to Calcutta suggest that the omnipresence of human misery explains why Hindus deify cows while ignoring the plight of their fellows.

Rossi acknowledges that mental illness causes some homelessness, because this acknowledgment is essential to his other chief recommendation—governmental policies to raise the incomes of the "extremely poor," defined as those whose incomes are less than half of the poverty level. Such policies depend on the prior removal of the psychotic fraction of the homeless. Rossi contends

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that the nonpsychotic extremely poor remain poor because they lack access to government programs intended to help them. Government programs also leave holes in the "safety net," he claims, through which people of minimal education, and those hindered by physical and mental disabilities and chronic illness or addiction, slip into destitution.

ROSSI SKETCHES his antipoverty proposals very broadly. But one can wonder whether measures to expand the effective demand for housing by the extremely poor will actually provide such families with homes.

Rossi estimates that there are four to seven million extremely poor households in America. Since he pegs the number of homeless at about 300,000, it is obvious that a far greater number of extremely poor people have homes than lack them. The total of poor people also suggests, as Rossi points out, that far more people are in danger of becoming homeless than are actually homeless; extremely poor families will probably be unable to pay enough rent or to spend enough on maintenance to keep their buildings livable.

Yet as one looks at the difference between the total number of the extremely poor and the much smaller number of homeless people, suspicion dawns that the homeless are a distinct set of the extremely poor. The homeless are heterogeneous, and they suffer from different disabilities. But all of them are at a disadvantage in finding homes—not only in the private market, but even in government-owned or government-subsidized housing built expressly for the poor. When Rossi properly urges the institutionalization of the mentally ill, he is simply excluding from the commercial home market a patently ill-suited group—one requiring not merely homes, but homes providing special attention.

The closing of the mental hospitals to a large fraction of their inmates created an urban problem not only because it increased the demand for homes within the cities, but also because it diminished the useful supply of housing. It did so not by physical destruction but by the willful withdrawal from the market of a class of special-use housing—the mental institutions themselves. State governments in most cases believed (or claimed to believe) that psychotropic drugs, voluntarily taken, would enable former psychotics to cope with deinstitutionalization and that "community-based facilities" would give better and more humane care. The only trouble with this scheme was its nearly total impracticality: many former psychotics "forgot" to take their drugs, and communities refused to open their doors to mentally ill neighbors.

Not only have beds in mental hospitals become unavailable; so have beds in flophouses, in single-room occupancy apartments, and in the rooming and boarding houses that once provided homes for the aged and the unmarried. Such places were ruined by the escalation of land value and the high cost of even their minimal

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services. Ever-rising affluence has encouraged young people to live by themselves, so the same number of people take up more apartments. Even if the income of the extremely poor were to be raised as Rossi suggests, it is not at all clear that homes would become available to them.

In the book's most interesting chapter, "Vulnerability to Homelessness," Rossi takes a closer look at the characteristics of the homeless, and makes clear that a very large majority of homeless people are exactly the kind of people that "communities" do not welcome. Even if they are not psychotic, alcoholic, or drug-addicted, they often look frightening, act in bizarre ways, and fail to meet their obligations. Unfortunately, the ones whose behavior and appearance are unexceptional are, for that very reason, not identified with the homeless; thus they do not alter the image of undesirability and danger that the homeless evoke. In New York, where the municipal government maintains and seeks to expand a chain of shelters, it has been hard to obtain local consent for their construction. Opposition cannot fairly be described as racist: when chosen indiscriminately and in large number, the homeless are unwelcome in black neighborhoods as well as in white ones—though both do consent to house a token number of the homeless, with the promise that the specific tenants will be selected with care.

In short, the effectiveness of demand by the homeless (and their advocates) for housing depends not only on finances, but also on the social desirability of those who seek housing. If increasing the size of welfare housing allowances creates effective demand, some entrepreneurs will probably respond to it; nevertheless, they will reject tenants who appear unable to meet the basic standards of tenancy, just as effective public-housing agencies have done since 1937.

SIGNIFICANT CHANGES in living patterns, furthermore, have created a housing demand for which no known supply exists. Most of the *families* that are described as homeless, and that have been living in motels and hotels on an emergency basis (qualifying cities for special federal reimbursement), are headed by teenage mothers who are unprepared to raise children. Experimental programs are trying to combine a fairly rigid housing program with intensive counseling, supervision, and parietal rules. Thus New York has laudably attempted to isolate female-headed families with children from the welfare-hotel population, by temporarily placing them in special institutions that impose rules and teach homemaking. Battered women and the elderly are also being extracted from the shelter and welfare-hotel population, with the help of nonprofit housing institutions and agencies.

If psychotics, female-headed families, old people, and battered women are separated from the sheltered and unsheltered home-

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less, we are left with the familiar Skid Row males, who are often violent and addicted to drugs or to alcohol. In the abstract, they might be thought capable of education and retraining—but sporadic educational initiatives have generally failed. The costs of building for this population new cubicle-type housing that would meet current standards would preclude any entrepreneur from supplying it. In fact, we can probably do no more for the "traditional" homeless population (that is, those who do not need institutional care) than what cities have done in the past, when they allowed part of their land to be used as slums in which normal bourgeois standards—which make continuing city life possible—did not prevail.

Local governments that are willing to spend money on remediable housing deficiencies should seek primarily to avoid the descent of extremely poor people into homelessness. This descent usually occurs when the buildings that the poor occupy—or hope to move to—fail to generate enough rental income to sustain them in reasonably sound condition. As the worst housing—much of it too unsound to be renovated—deteriorates, the poor will hope to move to somewhat better housing, as it is evacuated by families with higher incomes who move to better neighborhoods. Even when federal grants are unavailable, supplementing the rental payments of the poor with city contributions actually saves money for cities; it costs far less than the $100,000 spent in New York to restore *one* apartment for the very poor. Naturally, many philosopher-politicians will object to enriching grasping slumlords, but one can hope that municipal governments will sometime learn that carrots succeed better than sticks in stimulating entrepreneurs of modest worth to invest personal effort and new capital in housing.

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Voluntarism's New Look

LESLIE LENKOWSKY

***Alan Ware:* Between Profit and State: Intermediate Organizations in Britain and the United States.** *Princeton University Press. 308 pp. $42.50.*

NO MATTER how they are measured, tax-exempt philanthropic and voluntary organizations are hardly a significant group, even in the United States. Businesses and other for-profit entities vastly outnumber them. Government greatly outspends them in

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areas of common concern, such as health and education. A relatively small share of the labor force works full-time for them.

What theoretically distinguishes them and makes their work important, however, is their autonomy. Charitable and nonprofit groups are supported by gifts and run by volunteers; thus, many have claimed they are free of the normal constraints of politics and the market and are able to do what government or business cannot do. They can provide goods or services to unpopular or unprofitable causes. They can experiment and foster social change or, if they wish, preserve traditions and minority tastes. They can be more responsive to individuals. They can even resist the power of business and the state. For these reasons, nonprofit leaders like to refer to their organizations as a "third" or "independent" sector.

In Britain and the United States, the idea that such organizations should play a larger role in society has been enjoying a resurgence during the 1980s. The Thatcher government, as well as the Reagan and Bush administrations, have looked on the efforts of voluntary groups as likely to be less bureaucratic, more creative, and—significantly—less costly than many programs of the welfare state. Consequently, as they sought to reduce public spending, they have urged private donors and associations to do more.

Alan Ware's book defends the point of view of the legions in the nonprofit world who have been unhappy with this turn of events. Despite their claims to autonomy, voluntary groups (which Ware calls "intermediate organizations") have grown increasingly dependent upon government. Indeed, they often see themselves as "partners" with the public sector in addressing social priorities. As a result, the efforts of British and American officials to give them a larger role (while shrinking government's) have made voluntary and philanthropic groups fearful of having a less important one instead. But their fear, echoed by Ware, is groundless.

AS WARE points out, nonprofits are now significantly entwined with the public sector. Apart from the ways in which tax and regulatory policies affect them, nonprofit groups in the United States now receive over one-quarter of their income in the form of grants and payments for carrying out government programs. In Britain, where the state provides so many services directly, the proportion is much smaller; in higher education and a few other areas, however, it is overwhelming. Moreover, government not only sustains but also creates voluntary groups. According to one estimate cited by Ware, nearly one-third of the nonprofits begun in the United States between 1945 and 1980 received government grants at their founding.

Public funding is not the only discrepancy in what Ware terms the myth of "a distinct non-market, non-state sector." A growing portion of the private support for philanthropic groups now comes not from gifts, but from charges for services performed. In the

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United States, more than half of the income of nonreligious charities comes from such payments; in Britain, the amount exceeds two-thirds. Some organizations, in fact, have taken to selling their products and services so extensively that for-profit firms doing similar business have complained about unfair competition because of tax exemptions and other benefits that nonprofits usually receive.

Ware maintains that as voluntary groups derive more of their revenues from sales and contracts, commercial considerations are more likely to govern their activities than charitable ones. And even gifts often come with strings attached, or for purposes important mostly to the donor. As a result, the actual nature of private funding may incline the "independent sector" more toward preserving a healthy balance sheet than responding to pressing social concerns.

Ware also believes that volunteers cannot be counted upon to ensure that the nonprofit world is attuned to public priorities. In most organizations, and especially in the larger ones, professionals really dominate, leaving unpaid workers to do more menial tasks or help in fundraising. Consequently, decisions about an organization's priorities are apt to reflect their interests (which include keeping their jobs or enhancing their reputations), instead of the issues that might excite activists. In any case, Ware notes, volunteers too are often driven by self-interest, rather than by social concerns.

This is why many in the nonprofit world are alarmed by the prospect of having to depend more upon private funding and volunteers. They believe that they can better help society as partners with government than as alternatives to it. They also think that government is where power and influence reside.

FOR ALL their talk of independence, nonprofit leaders see their real role as bringing additional resources, expertise, and sensitivity to the work of the public sector. "If charities are to meet social needs," Ware writes, "they are likely to be most effective in doing so under conditions in which many of the parameters have been established by the state." As he makes clear, voluntarism today has much more to do with enlarging and dispersing public power than with checking it or creating competing centers of social innovation. That is why the old-fashioned notions emanating from Whitehall and the White House fell on such unreceptive ears.

Yet despite the complaints about cutbacks in spending, the 1980s have seen little change in the relationship between government and the nonprofits. Voluntary groups in the United States still receive about the same share of their income from government—including state and local governments—as they did at the beginning of the decade, even though private donations have risen

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rapidly. In Britain, public support for nonprofits has actually increased.

Ware is not unmindful of the risks of such dependency. In Britain, he reports, a system of providing public funds for higher education that was essentially run by the universities themselves has broken down under political pressures, so that certain areas of research and teaching are emphasized at the expense of others. As a result, some schools have taken the nearly unprecedented step of launching major drives for private support. Similarly, in the United States, charities with religious affiliations have been threatened with a loss of government aid unless they stopped giving spiritual instruction to those in their care. New York's Catholic Archdiocese, for one, has announced that rather than comply, it would refuse to accept public money for its foster homes and similar institutions.

Like most nonprofit leaders, however, Ware seems convinced that government can be kept at arm's length more easily than private supporters. The nonprofits' success in fending off cutbacks during the 1980s suggests that he may be right (although one should not exaggerate the control that private donors can exert). Even so, in an age of limited government growth but unlimited expectations, requiring more of voluntary groups than they might wish to provide is a temptation that public officials of all political stripes may find hard to resist.

A more serious risk, which Ware does not address, is to private support for voluntarism itself. If nonprofits identify too closely with the public sector, they may forfeit much of what distinguishes them from government. In the United States, as government expanded during the 1960s and 1970s, charitable giving as a fraction of national income declined. In Britain, where the share of national income originating in the nonprofit world is about the same as in the United States, individual contributions make up a much smaller portion, with the rest coming from fees and public subsidies. Surveys of large donors in the United States also indicate that a desire to promote society's welfare outside of government is a major factor in motivating them to give.

Even if the autonomy of nonprofits is more mythical than real, gifts and volunteers still count. At a minimum, they are the principal contribution that voluntary groups make to their partnerships with government. If they persist in thinking of themselves as quasi-public bodies, nonprofits may well find themselves with fewer people willing to provide such resources.

Would that really matter? The irony of the nonprofits' new look is that they hoped to stake out a more important role, but have wound up with a more dispensable one. If nonprofits, as Ware argues, operate best within "parameters" laid down by government programs, perhaps public bureaus could do their job just as well. Indeed, until the 1980s governments in most countries had been

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slowly but relentlessly moving into areas formerly occupied by nonprofit organizations. Judging voluntary groups by their success in collaborating with governments can only lead to further government encroachments.

Like too many leaders in the nonprofit world, Ware identifies the public interest with the interests of the public sector, seeing private motives as narrowly selfish ones. If that view were correct, voluntary groups should indeed act in concert with government. On the other hand, if the public interest also has other meanings, it would be useful and important for nongovernmental groups to seek them out. Voluntarism cannot be autonomous, but it can help create a public-spiritedness that is not controlled by government. Judging by Ware's book, and by the behavior of nonprofits in the United States and Britain during the past decade, this is a lesson that the forces of voluntarism do not sufficiently understand.

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All in the Family

DAVID BLANKENHORN

Pat Schroeder (with Andrea Camp and Robyn Lipner): **Champion of the Great American Family.** *Random House. 194 pp. $17.95.*

David Popenoe: **Disturbing the Nest: Family Change and Decline in Modern Societies.** *Aldine de Gruyter. 420 pp. $49.95 cloth, $24.95 paper.*

IN WASHINGTON today, "family policy" is a term unburdened by any specific meaning. Want to help the poor? Want to cut taxes? Want to support working women? Want children to pray in school? If you do, or do not, then you want "family policy." Similarly, "the family" and "family values," while frequently invoked, usually amount to little more than rhetorical Trojan Horses, intended to camouflage any number of special interests and hidden agendas.

Why is our current debate on the state of the family so weak and unfocused? Part of the reason, of course, is simple political opportunism: family rhetoric sells. But there is also a deeper and more intellectually important reason.

I would like to suggest that today's serious family debate becomes coherent only when seen as the clash of two implicit world

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views. Moreover, because these governing outlooks do not fit our usual categories of "liberal" and "conservative," they remain largely invisible to the public, and poorly understood even by many who are active in the debate.

One school of thought could be called optimistic and the other pessimistic. Both sides agree that the family is changing. But optimists emphasize the positive (or at least benign) results of those changes, particularly for women, and propose social policies to reflect and accommodate the new realities. Pessimists, on the other hand, see the family in decline as a social institution and emphasize the negative consequences of that decline, particularly for children.

Elite opinion today—in the media, in government, on the two coasts—tilts toward optimism, and away from the more pessimistic cast of grass-roots opinion. Congresswoman Pat Schroeder of Colorado is probably the nation's most prominent and articulate spokesman for the optimistic view. Her new book, *Champion of the Great American Family*, is an eloquent summary of the optimists' perspective on the changing American family.

Until recently, most scholarly experts have tended to be optimists. Mary Jo Bane's influential 1976 book on the family, for example, delivers a message that is implicit in the book's title: *Here to Stay*. Many ideas of family decline, she wrote, are "more myth than fact." Her study reported "surprising stabilities" in American families and "the persistence of commitments to family life."

Recent scholarship, however, has become more pessimistic. By far the most important benchmark in this direction is David Popenoe's *Disturbing the Nest: Family Change and Decline in Modern Societies*. Popenoe, a professor of sociology at Rutgers University, has written an important book that attempts to

> provide an objective analysis of family change—to present as much solid knowledge as possible about how the institution of the family in modern society is changing, why it is changing, and what the social implications of that change may be.

Although Popenoe's book is carefully nuanced to encompass alternative views, his conclusions are almost Spenglerian. For that reason, it is instructive to read his book together with Schroeder's.

It would be wrong to say that the books differ simply because one is political and the other scholarly. Nor is theirs the familiar dispute between "liberalism" and "conservatism." (Both authors, in fact, are "liberals" in the contemporary sense.) Their dispute is of a different nature: they disagree fundamentally on the social consequences of family change in our era.

FOR SCHROEDER, as with many people who write about the family, theory is autobiography; thus the subtitle of *Champion of the Great American Family* is "A Personal and Political Book." Schroeder's optimism about family change is rooted in her own

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experience. As a young attorney in Denver in the 1960s, she became a local, and later national, leader in the movements to expand opportunities for women in the workplace and in public life. In short, the women's movement changed her life for the better.

Along with her pioneering career achievements, Schroeder is also the married mother of two children. She knows well the often formidable challenges facing parents, especially mothers, who seek to balance career and family. She and her own family seem to have struck that balance with notable success, flair, and good humor. But it required adaptation. When her first child was born in 1966, she quit her job, only to discover that "I didn't like being a full-time homemaker. The truth is, I failed homemaking. I found it incredibly frustrating." She

> soon learned that children don't care who does their laundry or grocery shopping or makes their bed. In fact, they don't care if anyone does it.... In short order I gave up many of my ideas about what was required of a proper wife and mother.

Elected to Congress in 1972, she came to Washington determined to "champion women's rights and the American family." Her guiding principle has been that

> if we get rid of the inequalities that hinder women, we strengthen the family at the same time. For me, building a family policy has meant finding a way to bridge the gap between public policy and the reality of women's lives.

Schroeder today is a leading congressional proponent of what she terms "a national family policy." The main components of her proposed policy include: more child-care assistance for working parents; family- and medical-leave legislation, which would grant working parents the right to unpaid, job-protected leaves in order to care for newly born or seriously ill children; stricter child-support requirements for divorced or separated noncustodial parents, usually fathers; additional services and supports for divorced and widowed women, especially displaced homemakers; pay equity (comparable worth) for working women; greater state efforts to prevent domestic violence and child abuse; and larger tax deductions for families with children, especially two-earner families. Current policies, Schroeder argues, "lag far behind the realities faced by today's working families." Her proposed family policy, by contrast, would "acknowledge the kinds of lives women really lead" and assist families who are "desperate to find answers that will help them juggle all the chores modern life has laid upon them."

THERE IS much to admire in Pat Schroeder, and much to commend in her policy ideas. The particular vantage point from which she assesses recent changes in the family—as a champion of women's rights and of new opportunities for parents to combine work and family—is shared by millions of women and

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men across the country, precisely because it reflects the realities of their lives. Her perspective will almost certainly, and in my view properly, influence public policy in the 1990s.

Yet Schroeder's analysis of the family as a social institution is seriously flawed. These analytic failures, moreover, are not simply intellectual shortcomings; they distort her policy agenda. Also, especially because her views typify much of today's elite conventional wisdom, they help to impoverish the nation's larger cultural debate on the status and future of the family.

Her basic failure is this: she refuses to distinguish between the needs of working women as individuals and those of the family as an institution. Indeed, she frequently asserts that their needs are identical. Her entire analysis and policy agenda, in fact, are rooted in this core idea.

Doubtless this belief is comforting. It simplifies things; as if by magic, it solves what otherwise would remain highly difficult problems. And, of course, no one would deny the important (if complex) relationships between the status of employed women and the status of the family as an institution.

But employed women do not a family make. The goals of women in the workplace are primarily individual: social recognition, wages, hours, opportunities for advancement and self-fulfillment. The family is about collective goals that by definition extend beyond the individual: procreation, socializing the young, caring for the old, and building life's most enduring bonds of affection, nurturance, mutual support, and long-term commitment. Virtually any family scholar would agree that Schroeder's insistence on the idea of full symmetry is self-evidently untrue.

There is another, related problem. One of Schroeder's most deeply held beliefs—and a basic tenet of the optimists' view of the changing family—is that people who disagree with her suffer from a disabling "nostalgia" about "the mythical family" of the past. These confused people, she explains, have

> based their criticisms on a mistaken and nostalgic view of a family that never (or hardly ever) existed. The Norman Rockwell picture that is dragged out like an icon as our ideal family is not something many Americans have experienced in real life.

On a nationally televised interview in 1988, she repeated what has become her trademark opening comment on the changing family: that "only 7 percent" of today's families "fit the old 'Ozzie and Harriet' syndrome." To say that our nation's child-care policy must recognize the needs of traditional families, she writes, "is like saying the highway program must recognize people who don't drive."

These ideas—particularly the notion that few of today's families contain homemaker mothers married to breadwinner fathers—are very widespread. They largely govern the media's treatment of family issues, in no small part due to Schroeder's flair and per-

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sistence in marketing them. The 7-percent figure is probably today's most repeated statistic about the American family.

Yet these claims cannot be supported by the evidence. Certainly maternal employment and family diversity are among the most important family trends of the past quarter-century. But traditional families still comprise the nation's largest group of families with preschool children. Viewed from any reasonable angle, the 7-percent claim is flatly wrong—not just factually wrong in some technical sense, but fundamentally wrong, in that it creates a distorted picture of our society. So, of course, does the even wilder exaggeration that traditional nuclear families "never (or hardly ever) existed."

In addition, the "nostalgia" charge only diverts attention from the real question. David Popenoe clearly has Schroeder's type of argument in mind when he remarks that

> [b]eing nostalgic about the past may be in the same class as being optimistic about the future, and it is quite possibly a natural human propensity. But challenging popular nostalgia about families of the past says little about how the family as an institution has in fact empirically been changing, and whether or not that change could be defined as decline.

Schroeder's two core assumptions—that traditional families no longer exist and that employed women can be equated with the family as an institution—enable her to glide into a one-sidedly optimistic assessment of recent changes in the American family. We must, she argues, "rise above the doom-and-gloom predictions" of those who

> were wrong, of course. The American family was not in danger of extinction. Over the course of our three-hundred year history it has weathered far-reaching social and economic change by changing itself dramatically.

She insists that family decline has been greatly exaggerated:

> The statistics on divorce were high and on the increase, but so were the figures for remarriage. The majority of Americans who divorced did not give up on marriage, they just went looking for a more perfect union. People did not stop having children, they tried to figure out the best way to manage.

Note the straw men residing in these quotations. What serious analyst ever suggested that the family was becoming "extinct"? Who ever said that Americans were "giving up on marriage" or had decided to "stop having children"? These are not serious topics. Whether the family is in decline as an institution, however, remains profoundly serious.

Is it really true, as Schroeder implies, that marriage and remarriage convey the same good news about the institution of marriage? To borrow again from the Popenoe book, isn't that like saying that America's high rate of residential mobility proves that

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Americans love rootedness and community? After all, don't we move around in search of stronger roots and a better community? Even accounting for the usual quotient of hyperbole that we permit our political leaders, the glibness of this style of argument is remarkable.

IN SOME respects, Popenoe's *Disturbing the Nest* is a scholarly jeremiad; he asks that we reexamine the evidence and recognize the family "as a perishable social institution that is being quietly corroded by some of the social and cultural currents of our time." To him

> the interesting question is not why people believe in the "myth" of family decline, but why so many sociologists think of family decline as a myth and seek to dismiss the idea with such vigor and seeming certainty. The irony of the vigorous promotion by sociologists today of the antidecline position is that it comes precisely at a time when the family has been changing rapidly, far more rapidly than in those previous historical periods when the idea of family decline was pervasive among members of the social-science community.

Popenoe is a meticulous scholar. His book carefully evaluates a vast amount of evidence on recent family trends in four modern societies: Sweden, the United States, New Zealand, and Switzerland. The heart of the book, however, is an analysis of the Swedish family.

Popenoe focuses on Sweden—offering more information about this society, in fact, than some readers may desire—for two reasons. First, family decline has been greater in Sweden than in any other modern society. Moreover, current family trends in Sweden reflect, in advanced form, trends that are evident today in most modern societies, and particularly in the United States. New Zealand and Switzerland are examined, though less intensively, because they represent the other end of the spectrum: family change has been much less rapid in these nations.

Popenoe is at great pains to define "decline" analytically rather than pejoratively or morally. The family is "declining," in his view, when it is "becoming weaker" as an institution. This process includes five measurable trends: first, individual members become more autonomous and less bound by the family, which in turn becomes less cohesive; second, the family becomes less able to carry out its social functions (maintaining the population level, regulating sexual behavior, socializing children, and caring for its members); third, the family loses power to other institutions, such as schools, the media, and the state; fourth, families get smaller and more unstable as people spend less time in them; and finally, familism as a cultural value loses ground to other values such as individualism and egalitarianism.

Guided by these standards of measurement, Popenoe presents overwhelming evidence that family decline is one of the most sig-

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nificant trends in modern societies. Yet his evaluation cannot be reduced simply to what Schroeder calls "doom and gloom." He insists, for example, that "decline" is not simply "bad." It may well be that

> many aspects of family decline are "good," for the individual, for society, or for both. To think of family decline only in the negative makes no more sense than to think only negatively about the decline of feudalism, hereditary monarchies, or dictatorships.

The decline of the family coincides with the rise of many of today's reigning cultural ideals: personal autonomy, self-expression, individual rights, sexual freedom, social equality, and tolerance for alternative lifestyles. It may be true, on the whole, that people are happier today—despite or even because of family decline—than ever before. Certainly most people in the West live longer, in better health, and more affluently than ever before.

Popenoe fully concedes the advances of modernity. But he directs us to different, more troubling issues. Most people, he shows, "agree on the ideal of a strong family." Yet "the family decline in evidence today strikes at the very root of this ideal." Marriage, for example, is becoming "deinstitutionalized": in Sweden, one of every four cohabiting couples is unmarried, and nearly half of all childbirths occur outside of marriage. Yet "in all of human history up to the present some form of public marriage has been the basis of the family as a social institution."

The number of people living alone increased by 50 percent in Sweden between 1968 and 1981. Even members of families are becoming "less dependent on each other": they spend less time in the role of family member and more time as "clients of a large group of public employees who take care of them throughout their lives." Yet certainly these "nonkin relationships typically lack the special sense of obligations and responsibilities found in kinship ties." Is it not probable that these shifts weaken the "psychological anchorage" of adults in modern societies?

AT THE HEART of Popenoe's jeremiad, however, is the changing "social ecology of child rearing" and the manifest shift in modern societies "from child-centeredness to adult-centeredness." With each year, he concludes, modern societies are "drifting farther away" from what is demonstrably "the ideal child rearing environment." Such an environment includes

> a relatively large family that does a lot of things together, has many routines and traditions, and provides a great deal of quality contact time between adults and children; regular contact with relatives, active neighboring in a supportive neighborhood, and contact with the world of work; little concern on the part of children that their parents will break up; and the coming together of all these ingredients in the development of a rich family subculture that has lasting meaning and strongly promulgates traditional family values.

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Imagine two infants. You know nothing about them except these facts: one is born in the United States in 1950, and the other is born in the United States today. Now surmise—knowing full well the social and material progress of the past forty years—which of those two infants will have a better quality of life during childhood.

Your answer to this question may be the best indicator of whether, after all the facts are weighed and the issues debated, your view of the changing family is more optimistic or pessimistic. My own sense is that the pessimists have the better argument—that Americans today are increasingly unwilling, either through private behavior or public action, to value purposes larger than the self, and especially unwilling to foster good environments for children. I suspect that our "parent deficit" is at least as dangerous to our long-term well-being as are our budget and trade deficits. Perhaps, too, the habits of heart and mind that produce the latter also create the former.

Popenoe describes the complex challenge that we face with admirable balance and brevity:

> How can ... advanced nations encourage women to participate fully in public life, provide family members with all of the public facilities and services they need for lives of material equality and abundance, yet still maintain the family as a strong institution?

Few questions in our time are as urgent as this one. At stake is nothing less than the kind of society we wish to have.

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Taking Care of Business

BRIAN MANNIX

***David Vogel:* Fluctuating Fortunes: The Political Power of Business in America.** *Basic Books. 352 pp. $20.95.*

THE CURTAIN rises on an empty stage. In 1960 there is no Equal Employment Opportunity Commission, no Environmental Protection Agency, no Occupational Safety and Health Administration, no Department of Energy, no Consumer Product Safety Commission, no National Highway Transportation Safety Administration, and no Pension Benefit Guaranty Corporation. Somehow the world goes about its business without them. Vietnam and Watergate have not yet left their scars on the American psyche. Ralph Nader's bestseller *Unsafe at Any Speed* and Rachel Carson's *Silent Spring* are still unwritten; OPEC is an obscure bureaucracy.

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It is a time before Surgeon General's warnings, before Thalidomide, before carcinogens, and before PACs. If your company has a Washington office, you do not want to be there.

Fluctuating Fortunes, David Vogel's account of the business lobby in Washington, begins here and quickly enters the wonder years. In retrospect, the lobby had an awkward adolescence in the sixties and seventies. Some things came all too easily—when the automobile industry argued in 1963 that there was no need for any emissions controls on cars, the Kennedy White House agreed. At other times, business completely botched things—in 1966 General Motors managed to make Ralph Nader a national hero by hiring detectives to follow him around. Business's old rival, the labor lobby, was gradually losing influence; but new rivals appeared, who were strident and unfamiliar. Throughout these years, the business community grew more sensitive to the threats emanating from Washington, devoted more resources to influencing government policy and public opinion, and upgraded public-affairs departments.

Fluctuating Fortunes is mostly a chronological history of the legislative battles fought by business in Washington during the past three decades, focusing particularly on four areas: social regulation, tax policy, labor-management relations, and energy policy. Vogel aims to understand, but not to judge, business's influence on government, and the book is true to his claim that he has no political agenda—only an intellectual one. Vogel makes no attempt to divine what the interests of business ought to be; nor does he lecture the reader about appropriate political strategies or tactics. Instead he tries to measure the influence of business by its success in achieving the political objectives that it chooses to pursue.

The breadth of Vogel's coverage leaves little space for accounts of individual battles. Thus many readers will know more than he tells about particular episodes, and will catch an occasional error in names or chronology. But those eager to hear the blow-by-blow details can, of course, find them elsewhere. (Vogel's endnotes cite many of the relevant studies and make an excellent bibliography.) Bruce Ackerman and William Hassler's *Clean Coal, Dirty Air* is a classic exposé of the dirty deals behind the Clean Air Act's scrubber requirements; Dorothy Robyn's *Braking the Special Interests* charts trucking deregulation; Jeffrey Birnbaum and Alan Murray's *Showdown at Gucci Gulch* is an entertaining account of the 1986 tax bill. These more focused works have life-sized heroes and villains; in Vogel's saga, individual players and events sometimes come across as so much flotsam on the American political scene, notable chiefly as indicators of the direction of the tide.

Still, Vogel's wide-angle vision serves the useful purpose of charting the deeper currents that sway political fortunes. While recounting his tales of victory and defeat, Vogel repeatedly stops to take his bearings. He focuses on the state of the economy, the political struggles for control of the White House and of Congress,

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the size of public-interest groups, and the lobbying expenditures of corporations. He also cites numerous opinion polls in order to track the changing sentiments of the public toward business, of business toward government, and of everyone toward the economy.

VOGEL STATES his conclusions at the very outset. According to Vogel, business's influence on government is cyclical, much like the economy. It was secure during the early 1960s; it steadily declined from the mid-sixties to the mid-seventies, and then steadily recovered until recently, when it slipped a bit. Vogel attributes this pattern not directly to business cycles, but to "the public's perception of the long-term strength of the American economy." Public perception is, of course, linked to more objective measures of economic activity, but is much less volatile. Vogel's thesis will not come as a surprise to casual observers; nonetheless, he gives it good scholarly support.

Even though his narrative is confined to the recent past, Vogel provides a historical context. Toward the end of the last century the railroads had created a nationwide transportation system, and major industries such as oil and steel were developing national markets. The emergence of national corporations led the federal government to create the Interstate Commerce Commission (which has just celebrated its centennial) and to enact the Sherman Antitrust Act (which is about to do the same). In Vogel's view, business influence has been following its cycle for roughly a hundred years.

Despite this historical context, one is tempted to question the author's thesis, since so much has changed between 1960 and 1988. In addition to cyclical forces, there is clearly a trend toward greater government control of business. The trend is so strong that one is less struck by the fluctuating fortunes of business than by the good fortunes of business's opponent.

There is more than one opponent, of course. But in Vogel's narrative the opposition seems to have a single personality; treating it as a monolith is probably no more unfair than treating business as one. At times it appears to be a civil-rights movement or an antiwar movement that occasionally lashes out against corporate malfeasance; then it looks like a consumer movement or an environmental movement that leads antibusiness forces. Vogel uses the term "public interest movement" to describe the opposition to business; he carefully notes, however, that the movement does not necessarily represent the public interest. More radical members of the movement have described it as a class struggle by the underprivileged; Irving Kristol (himself part of a different *Public Interest* movement) has called it a class struggle by the overprivileged. Vogel notes, but does not join, this debate.

Vogel lists many of the factors that account for the success of the public-interest movement: the age structure of the population, its affluence and education, procedural reforms in Congress and

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the political parties, and especially the economies of scale in modern political activism (provided by television, telephones, computers, and subsidized postal rates). He also points to the parallels between the modern public-interest movement and the Populists, Progressives, and New Deal Democrats of previous eras. These historical parallels, however, only reinforce the impression that the public-interest movement may advance or consolidate its position, but that it never retreats.

For business, on the other hand, strategic retreat is a way of life. Vogel quotes a 1981 comment by White House aide Wayne Valis to a group of business lobbyists: "Like the Confederacy, you have only won defensive victories. That leads to defeat. If you will march with us this time, you will win offensive victories."

But while Valis was right for a while, the offensive lasted only a year or two. This is because business's role in politics is inherently defensive. The interests of capital represent existing claims on future income streams. These claims are based on the existing pattern of laws, regulations, and tax schedules, so that any changes in the law pose a threat. Thus business vigorously resisted the growth of the social-regulatory agencies; but no one would expect it to devote similar resources to reversing their growth. Indeed, in the past few years the businesses regulated by the Food and Drug Administration and by the Environmental Protection Agency have been lobbying to increase those agencies' budgets. Business groups often oppose the repeal of an environmental statute or a labor law as strongly as they opposed its passage. This was a lesson George Bush learned while chairing the Presidential Task Force on Regulatory Relief; while the business community spoke enthusiastically about regulatory relief in general terms, whenever Bush got into the nitty gritty of repealing or revising a particular regulation, he was sure to hear from business interests that wanted it to be left alone. Because of its defensiveness, business's influence—though sometimes great—is always handicapped. Like friction, it can slow down trains, or even halt them, but it will never cause them to move.

VOGEL'S ANALYSIS raises the interesting question of what it means to talk about the interests of business as a whole. Vogel recognizes that firms can use politics either to compete with each other or to advance their collective interest. But he "assumes that it is legitimate to generalize about the political fortunes of business." This assumption can obviously be questioned, but Vogel justifies it in much the same way that many defend intelligence testing. Whatever one chooses to call it, tests for "general intelligence" produce numbers that have predictive value. Similarly, Vogel persuasively argues that the political influence of business displays a factor that is separable from the efforts of individual firms, that this factor varies over time, and that it correlates with observable public sentiments about economic priorities.

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Yet the problem of defining the collective interest of business persists, in part because it is the object of two quests that run through the book. One is Vogel's search for issues that unite the business community; the other is the business community's similar search for unanimity and the political power that would accompany it. Vogel quotes Richard Darman's remark about business lobbyists in the aftermath of the 1986 tax reform bill: "They were brought down by the narrowness of their vision. Precisely because they defined themselves as representatives of single special interests, they failed to notice their collective power."

Collective power is a recurring theme in Vogel's book, but it is not altogether clear that it exists. The problem seems to be that there is not much that is worth achieving collectively. At least there is not much if the accounting is done strictly in terms of financial rewards. Business operates in fairly competitive markets for capital, labor, goods, and services, and this hinders its political organization. Any large interest group will face the problem of highly diluted benefits. But for the business lobby there is an additional dilution. Easing an emission standard for one firm will give it an economic advantage, whereas easing the standard for all firms will simply lower costs across the board. Firms will still save real resources (though the economy may not, since it may suffer emission-related damages); but firms operating in competitive markets will tend to pass the savings to consumers by lowering output prices. This means that no particular firm has an incentive to seek to lower emissions standards for all firms. As a general rule, then, there is little incentive for business to change laws when all firms would benefit equally from the change.

In practice, of course, few changes in the law do affect all firms equally. But if this is the case, the economic interest of the business community will be divided, which means that its influence again will be small. There are simply not many issues in Washington that promise to change the average returns to capital; and for those issues, the calculating businessperson would be a free rider on the efforts of others.

In contrast, the special breaks for individual firms—exemptions, extensions, permits, approvals, and other forms of exceptional treatment—will not generally be diluted by reductions in prices; hence lobbying efforts focus on competing for such breaks. As the opportunities for special treatment have multiplied, so have the resources expended in its pursuit. The vast majority of business lobbying in Washington is directed at obtaining individual advantage or preventing competitors from obtaining it. Trade policy, which Vogel does not treat, well illustrates this phenomenon: if anything can be said to reflect the collective interest of business, it is a firm policy of free trade. Yet, individual companies and industries perennially oppose, and overcome, the interest of business generally. Similar conflicts of interest are apparent in economic

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regulation. The wave of deregulation between 1974 and 1984 represented perhaps the most important change in public policy toward business since 1960—yet business participated in the deregulation debate only weakly, and often on the wrong side. Likewise, in tax policy, energy policy, and social regulation, the interests of individual businesses drive policy in a direction opposed to the collective interest of "business."

Nonetheless, Vogel finds numerous occasions in the mid-1970s on which business channeled considerable resources to benefit its collective interest. His chapter "The Political Resurgence of Business" describes various efforts to change the tone of the media's coverage of business, most notably Herbert Schmertz's aggressive public-relations campaign at Mobil Oil. Vogel also surveys business's funding of conservative foundations, think tanks, and scholarly journals; its sponsorship of books about business and economics; and its endowment of university professorships.

These public-education activities stand in contrast to routine business lobbying, in part because the profit motive is so attenuated that there must be some other motivation. One banker explained his actions this way: "I'd like my children to be able to do in business what I've done." These activities must be regarded as philanthropy—or, if you like, as management's use of stockholders' money to indulge its own appetite for meddling in public affairs. However you look at it, these efforts are not characteristic of the business lobby. Instead, what Vogel has captured in this chapter is the business community acting like a social class, engaged in advocacy based on a shared belief in the value of free enterprise. This is business acting more than anything else like its nemesis—the public-interest movement.

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Executive Power and Administrative Law

R. SHEP MELNICK

***Jeremy Rabkin:* Judicial Compulsions: How Public Law Distorts Public Policy.** *Basic Books. 322 pp. $22.95.*

THE NEW administrative-law doctrines announced by the federal courts in the early 1970s have unquestionably had a major effect on national politics and policy. Court rulings have increased the power of public-interest groups (especially environmental and civil-rights organizations), strengthened the hand of congressional subcommittees and their staffs, weakened White House and OMB

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control over administrative agencies, and generally produced more stringent regulation and more expensive entitlement programs. Nearly every federal agency has been touched by the "reformation" of American administrative law.

Yet very few people outside law schools have any idea what administrative law is, to say nothing of how it changed in the 1970s. The rules governing judicial review of administrative action are for all intents and purposes written by the courts themselves. Serious discussion of these issues is confined to a small circle of like-minded friends: appellate judges (especially on the District of Columbia Circuit) and professors of administrative law (primarily those at elite law schools). Not surprisingly, few within this circle harbor more than fleeting doubts about the superior wisdom of judges.

There are, to be sure, important dissenters, but they can be counted on the fingers of one hand: Justice Antonin Scalia, Solicitor General Kenneth Starr, former Judge Robert Bork, and Berkeley Professor Martin Shapiro. Those dissenters who held law degrees were quickly snapped up and given judicial appointments by the Reagan administration, which understood the political significance of seemingly arcane administrative-law issues. The judiciary's gain, however, was academia's loss. For the most part the current administrative-law literature is a morass of enormous footnotes, unsubstantiated hand wringing about bureaucratic arbitrariness, and perorations on the fairness of judges. Little wonder that such writing appears only in law reviews.

Jeremy Rabkin's *Judicial Compulsions* constitutes the most thoroughgoing critique of the "new administrative law" yet produced. Rabkin's style is often pugnacious. For example, he concludes the book by stating, "What animates the compulsions of judges is sheer constitutional confusion." He is intent upon shaking administrative-law scholars out of their complacency. But his work is much more than a polemic. Its arguments are subtle, sophisticated, and often complex. Rabkin ranges from Max Weber to *United Steelworkers* v. *Weber*, from Immanuel Kant to the English common law, from Alexander Hamilton to *Humphrey's Executor*.

Judicial Compulsions is really two books in one. The section entitled "Distortions of Practice" is comprised of three case studies of judicial supervision of administrative agencies: the Office of Civil Rights (OCR), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration. Rabkin provides a useful service by telling these complicated stories in detail.

At least three important themes emerge from the case studies. The first is that there was precious little substantive law for judges to call upon in these cases—despite all the talk by judges about preserving "the rule of law." Usually judges had a vague sense that something was rotten in the bureaucracy; initially they merely issued equally vague commands to do better.

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Second, judicial involvement riveted agency attention on secondary, even trivial matters. In the case of the OCR, for example, meeting court-established schedules for responding to individual complaints became paramount. "The litigation forced OCR to become a complaint processing agency, a sort of small claims court for civil rights disputes." Similarly, litigation brought by a Nader organization required the FDA to spend its time and other people's money eliminating health risks that everyone conceded were minute.

Third, court decisions increased the influence of interest groups that were already fairly influential within Congress and the agencies in question. "Put simply, litigation is most likely to prove an effective advocacy technique when the advocacy group involved already has a good deal of leverage." The use of litigation to increase bargaining power within the executive branch rather than to vindicate discrete, definable private rights is what most disturbs Rabkin. In his words, "the current pattern in administrative law is not a check on interest group politics. It is an extension of interest group politics under legalistic guise."

THE MORE theoretical section of the book ("Confusions of Thought") develops the last point in greater detail. In this, the most interesting part of his work, Rabkin makes two particularly important arguments. First, he contends that the new administrative law has seriously distorted the meaning of "rights." In explaining "why constitutional rights are individual rights," Rabkin argues that "the point of individualizing or privatizing rights is to leave some sphere of choice in which individuals can act without having to obtain the permission or consent of others." Most advocates of abortion rights, for example, want decisions about child bearing to be private, free from government control. The new administrative law, in contrast, encourages suits by what are often called "private attorneys general." It creates legal rights to collective benefits—such as clean air—that cannot be delivered to specific individuals and that impose costs on millions of people who have never even heard of the cases. Litigants come forward and are granted standing, not as bearers of identifiable private rights, but as self-certified representatives of various interests. Often the only right in question amounts to the open-ended right to see the law faithfully executed. Not only do rights cease to protect individual freedom, but public authority is handed over to interest groups that are in no way accountable to the electorate.

Rabkin's second argument is that the new administrative law distorts the separation of powers established by the Constitution. A peculiarity of administrative-law scholarship is that it seems oblivious to the fact that we elect a president every four years. One of the few similarities between the administrative-law experts of the 1930s and those of the 1980s is that both groups detested the presi-

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dent. In the 1930s the American Bar Association and its corporate clients lobbied for a version of the Administrative Procedures Act designed to restrict the power of "that man in the White House" and to gut his New Deal. In more recent times law professors of a much different political stripe have tried to insulate agency decisionmaking from control by the Nixon, Ford, and Reagan administrations.

Rabkin, in contrast, is an unreconstructed Hamiltonian. Being so far from the administrative-law mainstream forces him to defend his position, which he does with admirable frankness and clarity. Rabkin states that "[t]he notion that the will of Congress must prevail is the bedrock of contemporary administrative law." Yet "the whole point of the separation of powers in [the original] view is to forestall direct legislative control of the enforcement or implementation of laws.... [T]he executive was the one power left to think strategically or tactically, setting priorities among individual cases in order to serve larger aims."

THE KEY TO Rabkin's defense of executive power is not that old chestnut of administrative law—"expertise"—but responsibility, which legislators are adept at deflecting. As Richard Fenno put it, congressmen run *for* Congress by running *against* Congress. "Don't blame me, the other 534 did it" is the motto of the modern legislator. Judges are even more intent upon disclaiming responsibility for the results of the policies they create. In an interesting section entitled "Activism Reconsidered," Rabkin shows how the belief that the law must be enforced—regardless of consequences—has become the credo even of judicial realists.

As Harry Truman reminded us, the buck eventually stops at the door of the executive. Rabkin explains that

> [t]he enactment of a general legislative standard, just because it must be done abstractly and prospectively, always has a certain degree of wishfulness about it, as if the mere expression of legislative will or legislative intentions could alter reality in itself. But the executive is left to cope with the hard fact that not every legislative intention can be realized, certainly not at once, and certainly not when diverse legislative intentions are in practice contradictory. That is the logic of focusing responsibility for execution on a separate branch of government.

He argues that there is nothing wrong with partial execution of the laws (which is why we have prosecutorial discretion) or even with having the executive ignore particular laws—as long as identifiable private rights are not violated. Those dissatisfied with the general consequences of executive action, Rabkin implies, should take their complaints to the polls, not to judges. Once judges rather than presidents try to "take care that the laws be faithfully executed," responsibility is "displaced or concealed by legalism."

Rabkin's assessment of our current plight may be too gloomy. He sees administrative law not as the product of a small number of

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judges sitting on the Supreme Court and the D.C. Circuit, but as a manifestation of a more extensive and more deeply rooted legal culture. He states that "the larger target of this book is not the activity of judges but the climate of legalism in which contemporary judicial compulsions have thrived." As a result, he tends to understate the significance of recent Supreme Court decisions calling for more deference to administrators and limiting judicial review of agencies' refusals to act. Since both the Supreme Court and the D.C. Circuit are now deeply divided on many key administrative-law issues, and since President Bush will most likely make several appointments over the next three years, the twilight of the new administrative law may be upon us.

Even if Justice Scalia (to whom this book is dedicated) eventually puts together a solid voting bloc on the Supreme Court and somehow convinces the D.C. Circuit that the Supreme Court is the highest court in the land, troublesome questions about the legal limits on executive power will remain. Rabkin tends to sweep under the rug some of the most difficult perennial questions about the separation of powers. He concedes that

> [n]o American jurist has ever denied that governments can indeed create new rights to particular government benefits. Some of the most famous decisions of the Marshall Court in the early nineteenth century were precisely aimed at upholding individual claims to vested rights, created by government.... [T]here is nothing at all contrary to constitutional principles in allowing courts to enforce such claims against the executive—as Chief Justice Marshall concluded in *Marbury* v. *Madison*.

Rabkin adds that "there is no question that legislation can establish new private rights, enforceable against private persons, in many circumstances." Here, however, he fails sufficiently to consider the implications of this extensive congressional power. Thus one law passed in the 1970s grants handicapped children an open-ended right to a "free appropriate public education," and orders federal judges to conduct an "independent" review of the individualized educational plans established by local school systems. An environmental law might say that property owners are entitled to ground water free from even tiny amounts of hazardous contaminants, or that the workplace surrounding each worker must be free from toxic fumes. The point of these examples is that it is not hard to reformulate general legislative programs so that they confer particular benefits on identifiable individuals. Doing so would seem to invite and legitimize judicial interventions. Today's Congress, of course, is adept at creating such rights. As long as the Congress and the presidency are controlled by different parties with competing views on the proper size and role of government, courts will be called on to draw lines between rights created by legislation and the proper exercise of executive discretion.

Madison and Jefferson, of course, had no little difficulty with Hamilton's understanding of executive power. One need not fully

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accept Rabkin's apparent embrace of Hamilton's principle—that "a government ill executed, whatever it may be in theory, must be, in practice, a bad government"—to appreciate his illumination and elevation of the debate over the new administrative law. One can only hope that those whom he attacks will join the debate rather than ignore his contribution.

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Odds and Oddities

CALEB NELSON

***John Allen Paulos:* Innumeracy: Mathematical Illiteracy and its Consequences.** *Hill and Wang. 135 pp. $16.95.*

QUEEN VICTORIA, it is said, was so taken with *Alice's Adventures in Wonderland* that she asked Lewis Carroll to send her a selection of his other works. When he complied, however, Victoria was not grateful. For "Lewis Carroll" was the pseudonym of the Oxford mathematician C. L. Dodgson, and the books that he mischievously chose for his monarch were all treatises on mathematics.

The average person shares Queen Victoria's distaste for mathematics, and so authors of math books rarely have trouble cashing their royalty checks. John Allen Paulos's *Innumeracy*, however, has spent several weeks on the *New York Times* bestseller list. Its popularity is the most recent example of the phenomenon last seen when E. D. Hirsch's *Cultural Literacy* was atop the charts: Americans love to be told how much they do not know, even when they have no intention of filling the gaps in their knowledge.

Yet if this psychological quirk explains *Innumeracy*'s success, customers must be unsatisfied. Despite its subtitle, the book is not about "mathematical illiteracy and its consequences." Paulos barely mentions the tests that reveal the mathematical ignorance of American schoolchildren, and he does not even refer to those that confirm the mathematical superiority of children in the countries that are our principal economic competitors. Nor does he cite any of the truly frightening consequences of America's ignorance. One of the few concrete harms that he claims, in fact, is the Strategic Defense Initiative, which "would be so awesomely complex that it takes a kind of innumerate naïveté to believe it will work without bankrupting the treasury." (Edward Teller, one supposes, might have accomplished great things had he not been "innumerate.")

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Instead, Paulos's book is a collection of facts about numbers and probability. We learn, for instance, that if all the human blood in the world were poured into Central Park, the resulting lake would be less than twenty feet deep. We also learn that, more often than not, at least two members of any random group of twenty-four people will have the same birthday. And we learn that the annual Defense Department budget could be used to give each American family of four a $5,000 annual stipend.

In the course of presenting his facts, Paulos does make several arguments for teaching probability to high school students. The details of his plan are fuzzy; Paulos never makes clear, for instance, whether students should be required or simply encouraged to take probability courses. But Paulos is clear about the advantages of such courses. He argues that a knowledge of probability makes us better public and private citizens, better able to assess risk both in public policy and in daily life.

PROPOSALS TO boost our schools' math requirements rarely raise objections from people whose first concern is the quality of American education, and we could certainly do worse than require our students to learn about probability. But we could also do better. Probability has always been considered something of a luxury in high school, and—especially when our schools are failing to teach even such basic topics as arithmetic, algebra, and geometry—there seems little reason to focus on it.

In a sense Paulos is correct that life is "irreducibly probabilistic"; we owe our lives to chance from the moment of conception on, and ever since the advent of quantum physics much of science has depended upon probability theory. But though life itself can usefully be analyzed with probability theory, the questions that we face *during* life cannot. In contrast to the dice rolls and coin flips of elementary probability theory, one seldom knows even all the possible consequences of any real-life decision, let alone their various likelihoods. Policy debates and personal dilemmas therefore involve much more than universally accepted calculations of risk. The determination and the weighing of risk are largely subjective; they depend on one's conceptions of morality and justice. Even if all Americans were expert mathematicians, political debates would be just as frequent and as fractious as they are now.

Perhaps it is a measure of probability's inapplicability to policy that American political debate would not be notably advanced even if everyone knew all that *Innumeracy* teaches. The hypothetical level of blood in Central Park, for instance, is much less relevant to policy than the actual level of blood in Tiananmen Square. And President Bush would be unlikely to warm relations with Libya even if he were to discover that Colonel Qaddaffi shares his birthday.

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Some mathematics, of course, applies to policy. But the sort of math that is most useful is precisely what Paulos downplays. Though Paulos defines innumeracy solely in probabilistic terms, as "an inability to deal comfortably with the fundamental notions of number and chance," many mathematical topics are more important than probability. Calculus's ideas about limits and rates of change, for instance, are the heart of economics and many sciences; indeed, without calculus, quantum physics might never have been developed, and no one would now claim that life is best understood probabilistically. When policymakers use math, it is usually calculus that they use. Thus the Fed uses calculus to decide how to manipulate the American economy, and the Fed's critics use calculus to warn about the unfortunate side effects of the Fed's decisions. But while calculus sometimes helps people predict the consequences of proposed policies, probability theory lets people analyze policies only if they already have detailed information about the policies' effects—so detailed, in fact, that there is unlikely to be a controversy in the first place. Partly on policy grounds, however, Paulos criticizes as "wrongheaded" efforts to teach high school students calculus instead of probability.

IN THIS conclusion, incidentally, he is joined by much of the education establishment, whose quest to "engage" children rather than to teach them has led to curricula that stress experiments in probability at the expense of less entertaining but more instructive assignments. In fact, a coalition led by the National Council of Teachers of Mathematics (NCTM) is now attempting to transform school mathematics into an active experimental science, in which (in the words of the NCTM's recently released *Curriculum and Evaluation Standards for School Mathematics*) students would spend their days "gathering real data" instead of "do[ing] mathematics homework on paper at a desk." Such plans point to another danger in substituting probability for calculus: probability courses are much more likely than calculus courses to be fluff.

Some might argue that Paulos's error in promoting probability courses is less important than it might seem, since for most people the study of math—unlike any other discipline—is more useful for the habits of mind it inculcates than for the factual knowledge it conveys. Few adults, after all, ever use any math beyond algebra. And probability courses, if they are serious academic offerings rather than the fun-and-games sessions that the NCTM touts, teach just as much about precision and logic as calculus courses. Yet knowledge of calculus is vital to the minority of high school students who will go on to become engineers or scientists, and this minority is vital to the rest of us. Paulos's plan would retard their educations enough that some might pursue different careers. Tinkerers will try to repair the plan by tracking would-be scientists

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into calculus courses while teaching probability to everyone else, but it is wiser to get every child as far down the road to calculus as possible. For better or for worse, future scientists cannot always be identified in high school; and there is no reason to keep calculus secret from humanists.

By and large, Paulos's other policy prescriptions are less troublesome than his proposed emphasis on probability. Though he joins in the ritual call for higher teacher salaries, he breaks with the education establishment in advocating new methods of teacher certification that would permit retired engineers and the like to teach math in public schools. (Teachers' unions have long opposed such plans, despite their manifest benefits for students, because the new teachers might be less susceptible to union influence.) Paulos also proposes that grade schools hire math specialists to teach all math classes, since many elementary school teachers are themselves terrible at math. These ideas, while not original, are definitely worth adopting.

It would be wrong, however, to focus entirely on Paulos's comments about public policy. His book's charm, despite its misleading title, rests in its mathematical puzzles and paradoxes; *Innumeracy* is a poor man's version of Douglas Hofstadter's *Gödel, Escher, Bach*, the seminal work of popularized math. Paulos's book is neither so challenging nor so instructive as Hofstadter's, but it is breezily entertaining. And if its policy recommendations are not ideal, they are better than nothing. Some day, perhaps, they will help America achieve the dream of the state governor who pledged diligent efforts to ensure that on future standardized tests in his state, all students would score above the state average.

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The Politics of Authenticity

PHILIP J. COSTOPOULOS

***Robert L. Utley, Jr., ed.:* The Promise of American Politics: Principles and Practice After Two Hundred Years.** *University Press of America. 309 pp. $29.50 cloth, $14.75 paper.*

THERE HAS been much discussion of late about the possibility that we are entering a liberal-democratic moment—perhaps the final moment—in world history. If indeed we are, it is all the more urgent for us to shore up the virtues and guard against the vices that characterize liberal democracy. In such circumstances a

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book like this is particularly apposite, for it seriously considers the principles, problems, and prospects of the world's oldest, most stable, and still most exemplary liberal democracy: our own.

The volume is a collection of thoughtful and provocative essays, most of which originated as lectures presented under the auspices of the Tocqueville Forum on American politics at Wake Forest University. In keeping with its subtitle, its editor, Professor Robert L. Utley, Jr., has divided it into two sections dealing with, respectively, the principles and the practices of American politics. This arrangement reflects Utley's commendable belief that the "full meaning and character of any significant public policy comes to light only with reference to prior questions of fundamental political principle." His view is especially welcome in an age when most political commentators can conceive of no coherent relationship between principle and practice, and therefore see a world divided between unprincipled "pragmatists" and impractical "ideologues."

To their credit, the authors of these essays cannot be understood in terms of this dichotomy. Eight of them discuss issues ranging from crime to welfare policy to constitutional law in a duly practical manner; at the same time they are intensely concerned with the larger principles that inevitably inform all public policies. The four other authors undertake the broader, more obviously theoretical task of attempting to explicate the nature of the American regime. The contributors often address one another's arguments directly, which gives the book a pleasantly dialectical character. Although the essayists include mainstream liberals like Arthur Schlesinger, Jr., classical liberals like Hugh Heclo, and hard-to-classify conservatives like Harry V. Jaffa, the main debate contrasts neoconservatives with humanist Marxists or quasi-Marxists. For this reason, and for reasons of space, it will be best to focus on prominent representatives of these two schools, Irving Kristol and Sheldon Wolin.

Kristol's essay attempts to describe "the character of the American political order." He argues that this order must be understood as it reveals itself in the lives of ordinary Americans. He concludes that America is democratic (committed to popular sovereignty and a moderate egalitarianism); republican (supportive of constitutionalism and representative government); federal (characterized by the frequent diffusion of power to the local level); and capitalist (in favor of free enterprise, with some allowances for governmental regulation to promote the general welfare).

Most of all, though, America is religious. Its civic religion, according to Kristol, is a generically Protestant version of the Biblical tradition. Despite this Protestant origin, all the scriptural faiths affirm the tradition's central theme: the dignity and brotherhood of man under the sovereignty and fatherhood of God.

The citizens' broad commitment to this religious tradition is for Kristol the key to America's soul. Broadly construed, religion in-

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forms and binds together the various elements that make up the American way of life. When the Declaration of Independence speaks of "the Laws of Nature and of Nature's God," it leans decisively on this tradition, not on the more rationalistic theories of John Locke. Americans believe in human rights because they believe that man was created in the image of God.

Reflecting on the need for an "absolute basis" for American morality, especially the notion of human rights, Kristol avers that "values are not created; values are inherited." But one is left wondering about the need to speak of "values" that are "created" rather than of, say, "principles" that are "discovered." Even if values are transmitted through inheritance we must ask how those values came into being in the first place; we must also ask whether they have an objective basis or are only arbitrary artifacts. As John Courtney Murray once asked concerning the Declaration of Independence, "Do we hold these truths because they are self-evident, or are they self-evident because we hold them?"

Kristol quite rightly insists that the Declaration draws heavily on Americans' faith in what its authors called "the Supreme Judge of the world" for its authority. But their appeal to Heaven hardly precluded them from also appealing to "Laws of Nature" accessible to man's natural reason, following its own methods in its own order. Reasoned consideration of what is by nature right is always needed—especially now, when peoples who do not share our religious tradition are looking to us for guidance and inspiration in their struggles to secure human rights.

KRISTOL'S POINT is well taken; many nonrational factors—reverence for the past, the natural love of one's own, youthful habituation, piety, respect for authority, and so on—undeniably help to buttress universal moral and political truths. As James Madison once observed, a "share of prejudice in its favor ... is a salutary aid to the most rational Government." The catch, however, is that loyalty and tradition can also bolster the most narrow and vicious falsehoods. Among hard-line Communists in Russia and China today, for example, Stalinism and Maoism are seen as precious legacies that must be guarded against demands for strange new things like representative government and respect for rights. The nonrational sinews of loyalty listed above are not wicked in themselves—and are ineradicable parts of us in any case—but they do not establish an absolute foundation for our moral values.

Having limned the basic contours of the American way of life, Kristol discusses the source of most of the ills to which it is prone. He finds this source in the crisis of our religious tradition—specifically, in the decay of the Calvinistic strain that is at home with material things, because it sees economic effort as a means of glorifying God through hard work and right living.

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The predominance of this "Protestant ethic," Kristol believes, largely accounts for the success of American capitalism and America's resulting affluence. But in the very success of capitalism lie the seeds, if not of its own destruction, at least of its own distraction. For when the scientific disenchantment of the world—the secularization that accompanies the advance of technology and abundance—deprives the Protestant ethic of its transcendent religious purpose, the ethic tends inevitably to decay into "a joyless quest for joy."

Like Francis Fukuyama (in his recent speculations on the end of history) and Daniel Bell (in his writings on "the cultural contradictions of capitalism"), Kristol recognizes that the dreams of affluence that the consumer society fosters prove rather boring when realized. He identifies the existential ennui and quiet desperation that affluence breeds as the most serious problem facing America today. It is, to be sure, a problem of success—but such problems, as he wryly observes, are the worst ones. Certainly many of the often-intertwined evils that so afflict American life today—drugs and their related violence, sexual immorality and family breakdown, the lust for instant gratification, widespread anomie and moral antinomianism—flourish with special vigor when a critical mass of people has been freed from the immediate preoccupation with material sustenance that pervades a subsistence economy.

What can relieve this boredom and the problems it brings? Kristol's rueful answer is: nothing but more problems. And we cannot, of course, hope for the most obvious ones—war and economic depression. In this context, Kristol looks with tentative hopefulness to the much-denounced trend of increasing concern with moneymaking among young Americans. However truncated the self-interested virtue of the bourgeois may be, the habits of self-discipline and concern for others that it creates can, as Tocqueville noted, form the basis of a higher, truer virtue.

But is a return to the old Protestant culture of business possible? The rise of the postindustrial counterculture has affected the boardroom and the business school as much as other parts of American society. Over the last twenty years or so many men (and increasingly women) in gray flannel suits have been "greened" in a way that Charles Reich himself would not find unfamiliar. Many today, for instance, view their careers almost exclusively as vehicles for "self-realization." Meanwhile the connection between work and family life has grown looser; the tenuousness of domesticity in an age of no-fault divorce pushes it ever farther into the emotional background and makes it less significant as a motive for moneymaking. And the acquisitive, unattached young adult who combines economic libertarianism in the marketplace with antinomian individualism in matters of personal morality is far from uncommon nowadays. Many such people voted for Reagan and

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Bush, but their allegiance to the GOP (the traditional party of business) is highly uncertain, given the Democratic party's continued commitment to the ethos of permissiveness.

IN AN OBLIQUE way, the essay by the political theorist Sheldon Wolin, "State and Counterrevolution," touches on the same theme as Kristol's. What Kristol would call boredom Wolin, a leftist, calls alienation. This alienation (as much a political as an economic phenomenon in his reading) is said to have its roots in the American founding itself, which Wolin explores through a critique of the *Federalist*. Hamilton and Madison are culpable because they designed the new republic of the Constitution as a modern, centralized state meant to serve capitalism, which Wolin (who is joined in this judgment by Philip Green in his later essay on "Economics and the Public Interest") sees as inimical to democracy. Like Henry VIII and Richelieu, Hamilton and Madison were architects of a new, more rationalized (and thus more dehumanized) order that sought to overcome the venerable localism of the premodern, preindustrial world—in this case the world of the American colonies and the states of the Confederation period.

Wolin's critique of the Constitution as a Thermidorean reaction against the egalitarian democracy of the Declaration of Independence and the decentralization of the Articles of Confederation is not new. He borrows most of it from Progressives like J. Allen Smith, Vernon L. Parrington, and Charles A. Beard, and from more recent scholars like Merrill Jensen. Among other defects, all their accounts tend to misconstrue the republicanism of the Constitution as fundamentally antidemocratic. In addition, they understate both the defects that plagued the Articles of Confederation and the democratic nature of the process by which the Constitution was adopted.

Like many on the contemporary humanistic-Marxist left, Wolin mourns the "lost [i.e., communitarian] soul of American politics," and seeks to overcome the enervating alienation caused by the overcentralized, impersonal, capitalist order bequeathed to us by the Federalists. His method for doing so consists of a return to "authentic politics"—local activism by people seeking to reclaim power for themselves. Indeed, he discerns promising signs of this even amid the gloom of America after Ronald Reagan, whose efforts to curb the judicial creation of new rights—like his criticisms of civil libertarianism—arouse Wolin's wrath. His list of these signs is most revealing, chiefly for what it omits. The nuclear-freeze movement (a dated reference, as Wolin admits), environmentalists (perhaps a more bureaucratized and centralized group than he suspects), and ideologically correct activists in general all get the nod. His silence about other groups is a bit surprising, since his historical listing of anticentralist, traditionalist movements in America is unflinching: he mentions nullification-

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ism and secessionism (nativism might have been added) right alongside abolitionism and suffragism. But while Wolin acknowledges the moral and religious basis of traditional communitarianism, the mention of such sources fails to remind him of what is surely one of the most powerful, genuinely populist, and sustained grassroots movements in recent American history—the prolife movement.

Compared to the campaign against abortion that began in 1973, the push for a nuclear freeze was a passing fad. And as the research of Harvard psychiatrist Robert Coles revealed, the supposedly pervasive and unbearable fear of an imminent nuclear Armageddon that was said to have provoked the movement was rather suspiciously confined to the rarefied precincts of the liberal upper-middle class. The prolife movement, however, is genuinely localist and populist, and its populism is linked with its strong base in traditional religion and its intransigent insistence on the authority of transcendent moral norms. Taking it seriously as a form of "authentic politics" would require Wolin to confront the tension that exists between his longing for rooted, authoritative community as an alternative to capitalist alienation, on the one hand, and his enthusiasm for civil libertarianism, new rights, and (to a lesser extent) centralized welfarism and redistributionism, on the other. To combine a radical desire for tight-knit, populist particularism with an equally radical desire for individual freedoms and rights without apparent limits is not "authentic politics," but self-deluded utopianism.

I do not suggest that we must choose between the most atomized, rootless *Gesellschaft* and the most rigid, stifling *Gemeinschaft*. The equality upon which community is premised and the liberty by virtue of which rights exist both spring from our common human nature; indeed, they imply each other. To say that men are equal is to say that they cannot legitimately govern each other except on the basis of consent. Likewise, to say that men are free is to say that they are roughly equal, in the sense that none may be governed despotically—which means that all must have a say in the regime under which they live. The greatest expounder of this essential coherence between freedom and equality in American—perhaps even in world—history was Abraham Lincoln. When Stephen Douglas appealed to "popular sovereignty"—the principle of consent—in 1858 to solve the slavery-expansion question, Lincoln pointed out with relentless and irrefutable logic that no reasonable appeal to consent could be made that admitted slavery as a legitimate result. The reason was simple. The principle of consent, and therefore republicanism itself, presupposed natural human equality; slavery utterly denied it. When Douglas said that he "didn't care if slavery was voted up or voted down" by the white population of the territories, he was saying that he was prepared to accept an exercise of majority rule that negated its own principle.

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Wolin would do well to ponder Lincoln's teaching on the basis of the American regime, which points back to the Founding—the Declaration of Independence in particular—and shows the nobility and genius with which America's government combines freedom and community, rights and equality, in a manner governed by prudence and moderation. The Constitution, although forced to compromise with a defect—slavery—that it could not at first cure, nonetheless rested on the principles of free government laid down by the Declaration. Frederick Douglass once compared the Constitution's compromises with slavery to an ugly but unavoidable scaffolding erected around a beautiful building: once stripped away, it would leave the noble edifice to stand in all its brilliance.

Combining freedom and community, condemning men neither to alienation nor to oppression, is indeed a task for "authentic politics." Fortunately it is a task that our Constitution goes far toward accomplishing. But it does not do so automatically, for the Constitution accomplishes nothing unless we learn from it and live up to it. That kind of learning is the work of prudence, and that kind of living is the work of moderation. As the most thoughtful essays in this useful collection make clear, fostering these two virtues is the essence of authentic politics properly understood.

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Business Ethics and the Jews

JEREMY FAND

***Meir Tamari:* "With All Your Possessions": Jewish Ethics and Economic Life.** *The Free Press. 340 pp. $22.50.*

ARISTOTLE, at the beginning of his *Ethics*, warns that only a young man of good character should be permitted to study ethical philosophy. The reason is that philosophy is an analytical exercise that requires the student to distance himself from all received knowledge or wisdom, and to examine it critically. Morality itself is a matter of character formation rather than intellectual formation, of acquiring good habits of behavior rather than a sophisticated sharp-wittedness. This is something our business schools have forgotten (if indeed they ever knew it) as they multiply their courses in "business ethics."

To be sure, good habits will take you only so far in any particular set of circumstances. One will, at some point, need authoritative moral guidance. Traditionally, such guidance comes from the

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moral casuistry developed over generations by learned and pious priests, rabbis, or mullahs. There is no secular code of ethics—no situation-specific "thou shalt" or "thou shalt not"—that an active citizen can consult. Even if it did exist, there is no reason why anyone would feel compelled to obey it.

But even such moral casuistry, derived from religion, runs into trouble when it confronts individual economic activity. Religion, after all, is always more concerned with the health of the community than with the relative advantage of the individual, and is always more concerned with the individual's soul than with his material prosperity. So all religions face difficulties when they attempt to cope with economic behavior in general and "business ethics" in particular. This is especially true, of course, when we are dealing with self-interested economic behavior in a free-market economy, where external regulations by the secular authorities that reflect religious traditions are either nonexistent or minimal.

So it is not surprising that most religions are predisposed to take a dim view of market economies in general and, consequently, have an underdeveloped tradition of the kind of moral casuistry that is relevant to "business ethics." To this generalization, Judaism is an exception. It is not that Judaism is "procapitalist" in any ideological sense. It is simply that, for almost two thousand years, Jews have been constrained to engage in commerce and the rabbis have had to address problems of "commercial ethics" in a serious and sustained manner. The term "commercial ethics" is less misleading than "business ethics," since most of the rabbinical *responsa* antedate modern capitalism and are directed toward members of a religious community. There is some question, therefore, about their adequacy for a modern, free-market, growth-oriented economy embedded in a predominantly secular and non-Jewish society.

MEIR TAMARI is not bothered by any such doubt. An orthodox Jew who is the chief economist in the Office of the Governor of the Bank of Israel, he writes to summarize traditional Jewish views of commercial ethics. He also claims that these views, derived from *halacha* (Jewish law), create a "Jewish economic man," one who engages in economic activity while adhering to moral and ethical principles. Tamari disagrees with those economic historians who have looked only at the socioeconomic situation of Jews and have "divorce[d] Jewish economic practices from Jewish sources." He is especially critical of Werner Sombart's 1913 volume *Jews and Modern Capitalism*, which ignored rabbinic sources, saw capitalism as a quintessential Jewish "achievement," and attributed it to the Jews' need for political freedom and their ability to transcend national boundaries. Tamari argues that Jewish conceptions of morality and ethics, as developed in Talmudic teachings, have always guided Jewish economic life, and that this

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halachic background—not the economic system of the period—has determined Jewish behavior in the marketplace.

Tamari thus seeks to distance himself from Sombart's belief in a special Jewish affinity with capitalism. In Tamari's view Jewish economic ethics transcend any economic system, linked as they are to religious law rather than economic ideology. He does explicitly recognize that Judaism legitimizes the concept of private property, the profit motive, and the role of supply and demand in determining prices—which implies at least a partial preference for a free-market economic model. But Tamari will go no further than to suggest that a free-market economy is compatible with Jewish economic ethics. Tamari indicates that the "policy prescriptions" of the rabbis on issues like the environment, competition, monopoly, market efficiency, taxation, and care for the poor show uncharacteristic flexibility, much economic insight, and often more common sense than our modern-day lawmakers, policy makers, and bureaucrats display.

In the overview chapter on "The Economic History of the Jews" and throughout the book, Tamari argues that the rabbis were extremely flexible and could adapt the law to different situations. An example is the *Herem Hayishuv*—a rabbinic prohibition against Jews settling in a community when doing so would interfere with the livelihoods of those already there. This ruling was applicable only in Christian Europe and not in the Muslim empire, because the Muslims were relatively tolerant of Jews, whereas the more anti-Semitic Christians tended to restrict Jewish economic activity. Here moral idealism is incorporated in practical self-interest. Unfortunately, this synthesis is not always so easy to accomplish.

Tamari's book describes the manner in which Jewish thinkers and scholars have developed moral economic principles and institutions that have passed the test of time, and he suggests that "Jewish moral, ethical, and religious principles provided a framework of trust and responsibility without which the banking system, or the system of international trade in which the Jews played an important role, would have been impossible." This is surely a wild exaggeration and blandly ignores the role of Roman law, which the non-Jewish world knew far better than it ever knew *halacha*. But what is true is that Judaism, unlike Christianity, is a "this-worldly" religion that has never been contemptuous of business. Tamari points out that the medieval Christian doctrine of controlling prices and limiting profits had no counterpart in Judaism. The Christian view was that payment may be morally demanded only by the craftsmen who make goods or by those who transport them, but not by other middlemen. Thomas Aquinas even held that "the occupation of the merchant and all that surrounds it is to be justly condemned, since it serves only the lust of gain and Mammon." Jewish thinkers, by contrast, had little inhibition in recognizing the role of supply and demand in the market.

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Some inhibitions and prohibitions did exist, however. Tamari summarizes Judaism's limitations on economic activity as follows:

> 1. There is a limitation on the time permissibly allotted to economic activity, on account of the obligation to study Torah.
> 2. The production and sale of goods and services that are harmful to their consumers, either physically or morally, is forbidden.
> 3. One is responsible for damages caused by one's body or property.
> 4. Theft, or economic dishonesty in any form or guise, is forbidden.
> 5. One is required to limit one's appetite for material goods. One's disposable income is also automatically reduced by the demands of *tzedakah* [charity] and interest-free loans, and by taxation to finance welfare, education and the physical well being of the community.

Tamari believes that the existence of asymmetric information justified rabbinic intervention in the marketplace. His concern is with those who suffer in the marketplace from imperfect information. The laws of *ona'ah*—which mandate "fair prices," limit profits, and regulate merchants' activities—exemplify such intervention. The concept underlying *ona'ah* is that people must not take unfair advantage of their position when setting prices. *Caveat emptor*, Tamari observes, is a Roman idea, not a Jewish one. What Tamari does not point out, however, is that the concern with asymmetric knowledge arises because a considerable portion of a Jew's time is supposed to be spent in the spiritual domain—in studying Talmud and Torah and performing *Mitzvoth* (the commandments). Many of the limitations simply aim to protect the Jew whose primary concern is with studying the Torah and not with price comparison. How this pertains to Jewish-gentile commercial relations is not clear.

THE MOST significant limitation on market activity—which follows from the Jewish obligation to provide for the poorer members of society—in fact represents a kind of free-market approach to welfare. For as Tamari points out,

> despite the importance attached to welfare in Judaism and the obligation of society to actively promote such welfare, there does not seem to be in Judaism support for the concept of the redistribution of wealth that is the basis for much present day social thinking.... Furthermore, although we use the term welfare throughout this [book], it is important to note that Judaism is concerned much of the time with [individual] charity rather than transfer payments from the public purse as a free right.

The Jewish approach to welfare is primarily concerned with enabling the poor to escape from poverty by their own efforts. It does not limit free-market activity, because the free-market conception of welfare assigns responsibility to individuals to provide for the needy. Tamari further points out that although the community is supposed to provide for its members, all of them—including the poor—are required to pay taxes to help finance these

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services. Jewish law explains that receiving charity involves a cost; some shame and some discomfort is the price one must pay for assistance. As Tamari notes, liberal redistributionists have objected to the use of the word "charity" to describe the assistance that modern governments give to the poor. They prefer to call it "welfare," which they think better respects the dignity of the recipient. Unlike "charity," "welfare" provides free education, medical treatment, job security, and old-age pensions to all—irrespective of people's ability to provide for these services themselves. In contrast, Judaism's conception of charity, which mandates individual and communal concern for the weak and unfortunate, does not encourage welfare dependency. This is why Maimonides thought that the highest form of charity is supporting a fellow Jew "by giving him a gift or a loan, or by instructing him in a trade so that he should not need the assistance of others."

Tamari's book is very interesting; but it may not be as relevant as Tamari seems to think. A code of business ethics for a community of the faithful cannot be mechanically applied to a secular society in which the international marketplace (dominated by non-Jews) constrains the economic behavior of individuals. Those who have done business with Orthodox Jews, whether in Israel or the United States, do not find the experience all that different from their dealings with non-Orthodox Jews or non-Jews. Besides, Tamari ignores the fact that world-wide economic activity today is dominated by corporations and institutions whose top executives have a fiduciary responsibility to their investors. Where do scrupulous, *halacha*-abiding orthodox Jews fit into such a reality? Or are they to exclude themselves from it? One even wonders to what degree Tamari's own institution, the Bank of Israel, observes *halacha* in its commercial dealings. If it is strictly observant, people in Israel seem not to have noticed.

So Tamari has not provided us with a "guide to the perplexed" for those concerned with contemporary business ethics. Nevertheless, *With All Your Possessions* is a thought-provoking book. It does reveal to us what an authentic code of business ethics might look like, if only under very special circumstances. And it raises the question, which will not go away, of the relation of any code of business ethics to a prior religious commitment.

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